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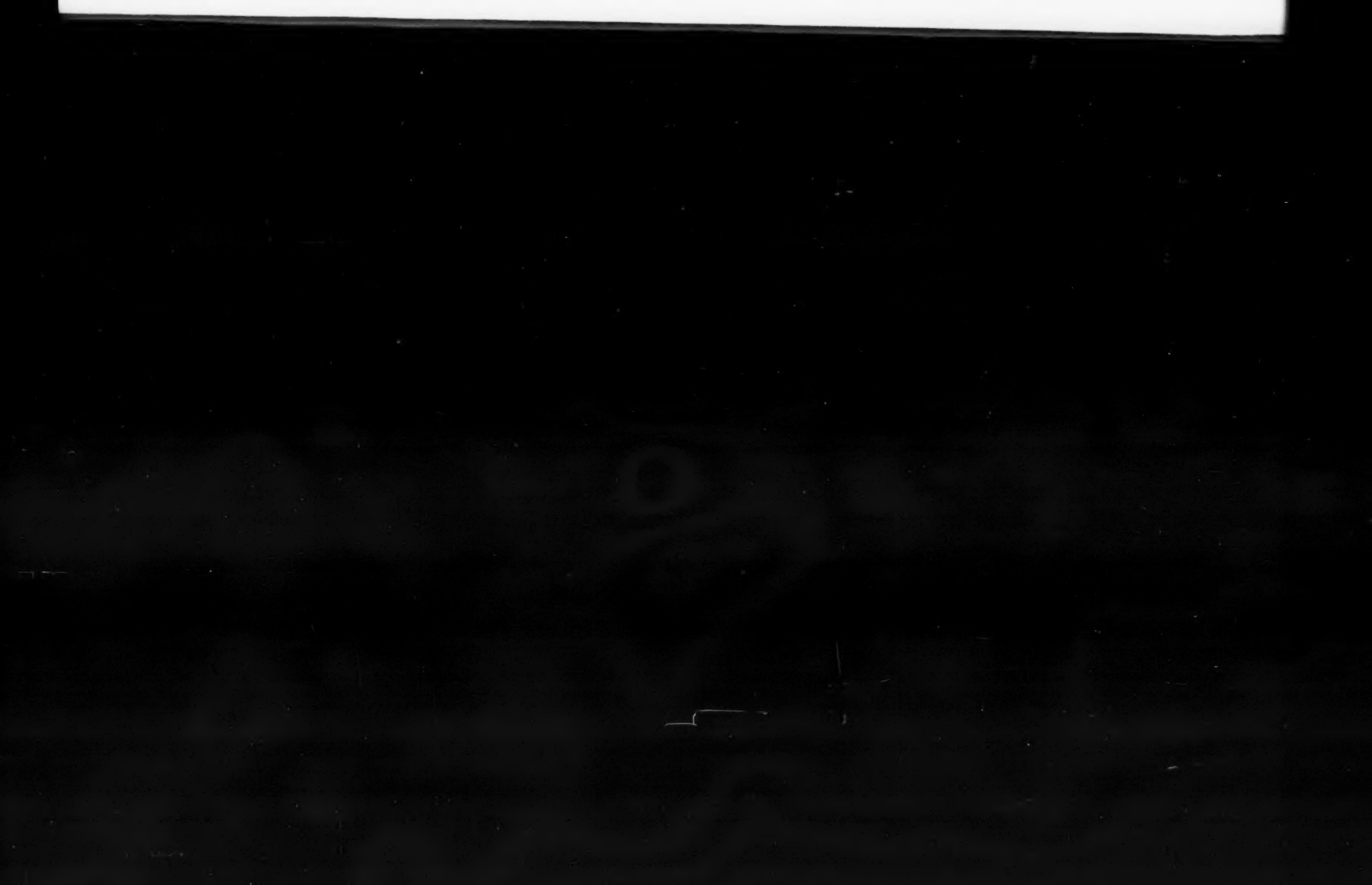

THE JOURNAL OF
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# THE OFFICE OF THE GENERAL COUNSEL OF THE AIR FORCE

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## ESTABLISHMENT

THE United States Air Force was born on September 18, 1947, clothed with very little except a full set of vexatious legal problems. Legally, or perhaps legalistically, it had a Secretary and a corporate entity but, as of that moment, no other personnel, no property, and no specific functions.

Sections 207 and 208 of the National Security Act of 1947[1] in substance created the entity, provided those general powers necessary for functioning as an entity, provided mechanics for equipping the new department with people, property and functions by transfer from the old War Department at the order of the Secretary of Defense, and then went on to other subjects. It was not until a week later when Transfer Order No. 1[2] was approved by Secretary Forrestal that the empty Air Force closet began to fill up. In that Order the Secretary of Defense transferred to the fledgling the military personnel who had belonged to the Army Air Forces, and conferred on the Secretary of the Air Force and his Chief of Staff the functions of the Commanding General, AAF.

A day or two before the first transfer order became effective, Mr. W. Stuart Symington, as first Secretary of the Air Force, established the office of General Counsel within his own office to help him thread his way through the legal maze with which he was confronted. The General Counsel's office is thus a creation of and responsible to the Secretary

[1] Pub. Law 253, 80th Cong.; approved 26 July 1947.
[2] See Table of Transfer Orders, *supra*.

of the Air Force while the Judge Advocate General is the legal adviser to the Chief of Staff. As a further measure of distinction between the two offices, the Judge Advocate General is by statute responsible for superintending the administration of military justice within the Air Force but has no duties in connection with law relating to procurement and contracting. The General Counsel is responsible for advice on request to all echelons in the Air Force in the latter field and, in addition, for advising the Under and Assistant Secretaries on the legal aspects of all other matters coming within their respective jurisdictions.[3]

The office, consisting of eleven lawyers, is divided into two portions; that which handles matters coming under the general heading of procurement, including management and disposition of property; and that which deals with other matters of interest to the members of the Secretariat. It is thus not parallel with any office in either of the other military departments, despite the fact that there is one bearing the same name in the Navy Department. A listing of some of the major problems considered since the foundation of the office will demonstrate this distinction even more clearly. They include the interpretation and application of the National Security Act; development of loyalty programs for civilian employees of the Department, military personnel, and employees of contractors working on classified Air Force contracts; the legal authority for appropriation of long-term procurement funds for aircraft; and assistance in the development of the Armed Services Procurement Regulations and the Renegotiation Act of 1948.

### Separation from the Army

Reference was made above to Transfer Order No. 1 issued under the authority of the National Security Act. Faced with the problem of moving officers, enlisted personnel, civilian employees, aircraft, responsibility for the loyalty of Air Force civilian personnel, authority to approve contracts for the purchase of aircraft, and innumerable other equally diverse items from the Department of the Army (formerly the War Department) to the Air Force, the lawyers in the two departments affected and the office of the Secretary of Defense developed the "Transfer Order" which has now become a term of art in the Pentagon Building.

The transfer provisions of the National Security Act are set out in a footnote.[4] It will be seen that a number are mandatory and no serious

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[3] Memo 20-5, Office, Sec'y. of the Air Force, 30 Aug. 1948, Chart 6E, Organization & Functions of the Hq., USAF, 1 Dec. 1948.

[4] National Security Act of 1947 Sec. 207(f). So much of the functions of the Secretary of the Army and of the Department of the Army, including those of any officer of such Department, as are assigned to or under the control of the Commanding General, Army Air Forces, or as are deemed by the Secretary of Defense to be necessary or desirable for the operations of the Department of the Air Force or the United States Air Force, shall be transferred to and vested in the Secretary of the Air Force, and the Department of the Air Force: . . . Such of the property, personnel, and records of the Department of the Army used in

problem arose as to them except to decide whether further action was necessary and if so by whom. This was solved in Transfer Order No. 1 which carried these mandatory items. The new Air Force was, however, nearly left without a Chief of Staff as the result of the requirement in the Act[5] that he be appointed from the general officers "assigned to or commissioned in the United States Air Force." The officer transfer provision in Section 208 (c) authorized the transfer only of officers commissioned in the Air Corps or the AAF, and all general officers were at that time commissioned in the United States Army. In order to transfer the AAF general officers to the Air Force so that the Chief of Staff could be appointed from among them it was necessary to include in this first transfer order a special provision under the broad provisions of Section 208 (e).

By far the most difficult problem involved in the working out of the transfer process has been the definition of "functions," the determination of which ones pertained to the department merely by virtue of its status, and the decision as to which additional ones should be transferred. In view of the fact that the wages and salaries of hundreds of thousands of military and civilian personnel, the expenditure of literally billions of dollars for new aircraft, the responsibility for untold amounts of property, and the job of keeping the Air Force in operation as a going concern were involved, it was clear from the outset that each function would have to be defined with clarity and transferred with precision in order that at no time would there be room for doubt as to which department had the responsibility for what.

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the exercise of functions transferred under this subsection as the Secretary of Defense shall determine shall be transferred or assigned to the Department of the Air Force.

Sec. 208(a) . . . The Army Air Forces, the Air Corps, United States Army, and the General Headquarters Air Force (Air Force Combat Command), shall be transferred to the United States Air Force.

Sec. 208(b) . . . The functions of the Commanding General, General Headquarters Air Force (Air Force Combat Command), and of the Chief of the Air Corps and of the Commanding General, Army Air Forces, shall be transferred to the Chief of Staff, United States Air Force. . . .

Sec. 208(c). All commissioned officers, warrant officers, and enlisted men, commissioned, holding warrants, or enlisted, in the Air Corps, United States Army, or the Army Air Forces, shall be transferred in branch to the United States Air Force. . . .

Sec. 208(e). For a period of two years from the date of enactment of this Act, personnel (both military and civilian), property, records, installations, agencies, activities, and projects may be transferred between the Department of the Army and the Department of the Air Force by direction of the Secretary of Defense.

Sec. 306. All unexpended balances of appropriations, allocations, nonappropriated funds, or other funds available or hereafter made available for use by or on behalf of the Army Air Forces or officers thereof, shall be transferred to the Department of the Air Force for use in connection with the exercise of its functions. Such other unexpended balances of appropriations, allocations, nonappropriated funds, or other funds available or hereafter made available for use by the Department of War or the Department of the Army in exercise of functions transferred to the Department of the Air Force under this Act, as the Secretary of Defense shall determine, shall be transferred to the Department of the Air Force for use in connection with the exercise of its functions. . . .

[5] Sec. 208(b).

As a means to this end it was early decided to define "function" as a function, power or duty[6] conferred expressly on the War Department by statute or executive order. With this postulate laid down, it was possible for the new Department to proceed with its day to day business while preparing itself for the gradual assumption of the additional jobs which the War Department had in the past performed for the Army Air Forces but which were necessary for the operation of an autonomous department. The mechanism of the transfer order enabled the Air Force to cull out all of the laws in a given field of activity which it needed in order to operate efficiently, reach an agreement with the equivalent section of the Army staff as to post-transfer relationships, make whatever preparations were necessary to insure that the responsibility could be performed when received, and then, upon joint recommendation of the Secretaries of Army and Air Force, secure the signature of the Secretary of Defense effective at a carefully fixed time. By January 1, 1949, there had been a total of 30 transfer orders signed, on subjects ranging from procurement of aircraft, jurisdiction over real property in the hands of the Air Force, representation on the Air Coordinating Committee, management of the loyalty programs, finance functions relating to Air Force matters, to "certain functions relating to military records."

TRANSFER ORDERS

| *Transfer Order Number* | *Subject* | *Effective Date* | *Federal Register Citation* |
|---|---|---|---|
| 1 | General | 26 Sep. 1947 | 12 FR 6616 |
| 2 | Officer Personnel Act | 1 Oct. 1947 | 12 FR 6736 |
| 3* | Military Personnel | 31 Oct. 1947 | 12 FR 7327 |
| 4 | Civilian Personnel | 30 Nov. 1947 | 12 FR 8891 |
| 5 | Air Coordinating Committee | 31 Dec. 1947 | 13 FR 218 |
| 6 | Procurement and AF Procured Property | 15 Jan. 1948 | 13 FR 218 |
| 7 | Inspection | 5 Mar. 1948 | 13 FR 1378 |
| 8 | Unit Organization | 1 Apr. 1948 | 13 FR 1930 |
| 9 | Central Welfare Fund | 17 Apr. 1948 | 13 FR 2292 |
| 10 | Civilian Components | 27 Apr. 1948 | 13 FR 2428 |
| 11 | Finance | 10 May 1948 | 13 FR 2678 |
| 12 | Repairs and Utilities | 14 May 1948 | 13 FR 2951 |
| 13 | Civil Air Patrol | 21 May 1948 | 13 FR 2967 |
| 14 | Real Property | 1 July 1948 | 13 FR 3094 |
| 15 | Atomic Energy Act | 7 June 1948 | 13 FR 3252 |
| 16 | Military Personnel Management | 14 June 1948 | 13 FR 3461 |
| 17 | Foreign Missions | 6 July 1948 | 13 FR 3970 |
| 18 | Construction | 7 July 1948 | 13 FR 4014 |
| 19 | Loyalty and Security | 1 Sep. 1948 | 13 FR 4419 |
| 20 | Military Records | 12 Aug. 1948 | 13 FR 4874 |
| 21 | Aviation Cadets | 4 Sep. 1948 | 13 FR 5383 |
| 22 | Security of Contractors | 1 Sep. 1948 | 13 FR 5665 |

[6] Sec. 308(a), National Security Act of 1947. "As used in this Act, the term 'function' includes functions, powers, and duties."

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|---|---|---|---|
| 23 | Correction of Military Records | 27 Sep. 1948 | 13 FR 5837 |
| 24 | Soldiers' Finance Matters | 11 Oct. 1948 | 13 FR 6126 |
| 25 | Finance & Fiscal Matters | 14 Oct. 1948 | 13 FR 6270 |
| 26 | Transportation | 15 Oct. 1948 | 13 FR 6302 |
| 27 | Civilian Welfare Fund | 1 Nov. 1948 | 13 FR 6707 |
| 28 | Military Signal Duties | 22 Nov. 1948 | 13 FR 7417 |
| 29 | Recruiting and Enlistment | 10 Dec. 1948 | 13 FR 8162 |
| 30 | Decorations and Awards | 10 Dec. 1948 | 13 FR 8163 |

* Amendment No. 1, Transfer Order No. 3, effective 12 June 1948, 13 FR 3867.

The transfer process is now so nearly completed that there are at present only about half a dozen additional transfer orders in contemplation, covering for the most part items for which much advance preparation was necessary. As a partial result of the care which went into the planning of this process, the Secretary of Defense was able to say in a statement saluting the first anniversary of the establishment of his office and the separate Air Force, "It has been a source of gratification to observe the smoothness and efficiency which have marked the separation of the Air Force from the Army."[7]

### Legislative Planning

The conclusion of the transfer process will not, however, result in a complete statutory house for the Air Force neatly bounded by a picket fence of laws made applicable by Transfer Order. The laws transferred refer nearly without exception to the "War" Department and the Secretary of "War" – but not all of the laws so phrased have been transferred or are desired by the Air Force. The researcher seeking to find the powers of the Air Force must, accordingly, first determine whether the old War Department had been authorized to take the action under consideration and must then search through the Transfer Orders to see if the law involved has been transferred. It is apparent that serious study must be given to the question of whether such a situation is adequate for the long pull, and if not, what sort of legislation should be requested to replace it.

A similar, although quite separate, problem is the extent to which the organization of the Department of the Air Force is based on the laws prescribing the organization of the War Department and the Army, the extent to which it is possible or desirable to transfer the applicability of such laws, and the desirability or necessity of obtaining new legislation defining whatever internal organization is determined upon. Without attempting to decide the many purely policy issues involved in the solution to these questions, the Office of the General Counsel has been active in attempting to isolate and define the problems and point out the relevant legal considerations. As a member of the Air Force Legislative Policy Board,[8] along with the Assistant

[7] National Military Establishment Release No. 152-48, 18 Sep. 1948.

[8] Memo 20-10, Office, Sec'y. of the Air Force, 14 Sep. 1948.

Secretary (Management), the Director of Legislation and Liaison, the Director of Public Relations, and the Vice Chief of Staff, the General Counsel is afforded an opportunity to bring to the attention of the policy formulators the fields in which he considers that additional legislation is necessary.

### PROCUREMENT

In the field of procurement law, the principal responsibility of the Office of the General Counsel is to provide advice on legal matters to the Under Secretary who is ultimately responsible for Air Force procurement. Staff supervision over procurement activities is exercised by the Deputy Chief of Staff, Materiel, and his organization located at the Air Force Headquarters in Washington.[9] Such legal advice as is needed by this staff is also furnished by the Office of the General Counsel. The actual business of negotiating and drafting contracts is performed by the Air Materiel Command at Wright-Patterson Air Force Base in Dayton, Ohio. Legal advice as to the normal incidents of routine contracting is furnished the Materiel Command buyers by a section of the office of the Materiel Command Staff Judge Advocate who is authorized direct communication with the Office of the General Counsel on particularly troublesome legal problems or those requiring policy decisions.[10]

Under the National Security Act, one of the functions of the Secretary of Defense is to coordinate procurement among the military departments.[11] He transferred legal authority and responsibility for procurement of the items assigned to it by the Munitions Board to the Air Force by Transfer Order No. 6, effective January 15, 1947.[12] Well before this date the General Counsel's office had been engaged in designing a system to insure that the responsibility when acquired would be performed according to the law, as well as in the preparation of the transfer order to insure that all necessary statutory authority was included.

The first aircraft purchased by the Government were bought under the provisions of an 1861 statute of general application to Government procurement[13] which as a general rule required advertising and competitive bids as a precedent to procurement. As a result of the Morrow Board, Congress enacted the Air Corps Act of 1926[14] requiring what was called "design competition," but the accent remained on competitive bidding as a result of advertising. During the war years, however,

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[9] Chart 8, Organization & Functions of the Hq., USAF, 1 Dec. 1948.

[10] Paragraph 1-103, Joint Procurement Regulations, as amended by Joint Army & Air Force Procurement Circulars Nos. 1 & 16, dated 15 Jan. and 28 June 1948.

[11] Sec. 202(a)(3).

[12] See Table of Transfer Orders, *supra*.

[13] Revised Statutes, Sec. 3709, as amended; 41 USC 5.

[14] 10 USC 310; 44 Stat. 784.

when the great bulk of aircraft was procured, contracts were negotiated under the authority of the First War Powers Act.[15]

With the approach of V-J day, the armed services realized that the technical advance in aircraft and other items of combat materiel made procurement through advertising in many instances completely impracticable, even in peacetime. Accordingly, they drafted and supported a bill which, as changed in minor respects by the Congress, was eventually enacted and approved by the President on 19 February 1948 as the Armed Services Procurement Act of 1947.[16]

This Act is considered as a milestone in the history of military procurement. Consistent with the long history of Government purchasing, it recognizes competitive bidding as a result of advertising to be the basic and normal method of procurement of supplies and services, but it also recognizes that this general principle has a number of exceptions and provides procedures to authorize procurement through negotiation in those exceptional circumstances. Exception 14, which was inserted in the law particularly to cover the procurement of aircraft, applies to "supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies." Much of the work of the Office of the General Counsel during the past year has centered around the interpretation and application of this law.

The power to negotiate contracts for aircraft is essential. As the military and technical sciences progress, requirements are developed which cannot be filled by any existing military airplane. There may, indeed, be no known method of fulfilling the requirement and an attempt to invite bids for construction of an aircraft would therefore be out of the question. Under these circumstances, one or more research contracts are necessary to determine whether it is possible to develop an item which will satisfy the military requirement. The "know-how" of particular companies within the general fields involved then becomes an important item, and research contracts may be negotiated with the company or companies which from past experience are considered by the Air Force most likely to produce the desired result.

Months or even years of basic research and development may be spent before the Air Force is sure that an airplane evolved out of the research and development under one or more contracts is what is wanted. To stop at this stage and circulate invitations for bids to manufacture the resulting airplane as an end item would be costly, time-consuming and unlikely to result in the greatest advantage to the

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[15] 50 USC App. 611, 55 Stat. 839, 18 Dec. 1941.

[16] Pub. Law 413, 80th Cong.; approved 19 Feb. 1948.

Government. Those companies which have developed the airplane have acquired "know-how" with respect to it and may have, whether for their own account or for the account of the Government, made an extensive investment in industrial facilities. Considerations of industrial mobilization could warrant placing production contracts for that aircraft with other manufacturers, but usually the manufacturer who developed the aircraft is best qualified of all potential manufacturers to produce it in quantity. The statutory exception to the general rule regarding competitive bidding which is quoted above recognizes this fact and authorizes the procurement of the final product by negotiation. Under the Armed Services Procurement Act, negotiation is authorized by a number of other exceptions to the general rule in such circumstances as when the public exigency so demands or when competition is impracticable, and it not infrequently becomes a legal question to determine whether negotiation has been undertaken under the proper exception.

A complete airplane is rarely procured from a single contractor. As a general rule, the airframe itself, the main body of the airplane, is procured from a prime contractor, who may subcontract various portions of the airframe assembly. Usually, the manufacturer who constructs the airframe is not engaged in the manufacture of engines or propellers. These items, and frequently many others, are procured by the Government from other manufacturers and furnished to the airframe manufacturer for incorporation therein so as to make a complete aircraft. The procuring of a quantity of airplanes is thus in reality a *program* of negotiated contracts relating to airframes, propellers, engines, or a dozen other items which go into a completed aircraft.

The considerations outlined above have extended for greater and greater periods the time required to design and produce an airplane but the Constitutional grant to Congress of the power "to raise and support Armies" provides further that "no Appropriation of Money to that Use shall be for a longer Term than two Years."[17] Although the conclusion that this is not a limitation on *all* procurement for the Army has been recognized for many years, appropriations to the War Department for the procurement of aircraft normally have been limited to one or two years. The point has now been reached where procurement of aircraft will be seriously hampered if appropriations cannot be made available for more than one or two years and long term procurement authority was recommended as essential by the President's Air Policy Commission[18] and by the Congressional Aviation Policy Board.[19]

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[17] Article I, Sec. 8, Clause 12.

[18] Pp. 60-61, SURVIVAL IN THE AIR AGE, a report by the President's Air Policy Commission, Washington, 1 Jan. 1948.

[19] Recommendations 57 and 58, p. 35, NATIONAL AVIATION POLICY, Report of Congressional Aviation Policy Board, March 1, 1948, Senate Report No. 949, 80th Cong., 2nd Sess.

Without passing on the question of whether this constitutional limitation still applied to the Air Force following its separation from the Army, the conclusion was reached by the office that, even if it did, "there appears to be no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended." This conclusion rested on a 1904 opinion of the Solicitor General that the constitutional limitation does not apply to the procurement of weapons and other equipment necessary to enable personnel to carry on war,[20] and has been confirmed by the present Attorney General.[21]

With the foundation thus laid, in the Supplemental National Defense Appropriation Act, 1948,[22] which appropriated funds to the Department of the Air Force for construction of aircraft and related procurement, Congress included the following provision:

> **"*Provided*, That the unexpended balance of funds appropriated for the foregoing purposes under the head 'Air Corps, Army,' in the Military Appropriation Act, 1948, shall be consolidated with this appropriation, to be disbursed and accounted for as one fund *which shall remain available until expended.*" (Italics supplied.)**

This was not only the first appropriation made by the Congress directly to the Department of the Air Force, it was also the first time the Congress had provided money for the procurement of military aircraft with unlimited time for utilization. Under the new law, contracts have been placed in such a manner as to constitute the beginning of a long-range procurement program which is related to the needs of the Air Force rather than to limitations on the use of appropriations.

The same act provided appropriations and contract authorizations to the Departments of the Army, Navy and Air Force in a total amount of more than $4,000,000,000. Since the major portion would be spent with the aircraft and related industries, thus creating an abnormal volume of business for them, the Congress included a provision making certain contracts — roughly those executed pursuant to that Act — subject to renegotiation, in order to insure that excessive profits would not result to contractors from such huge expenditures. Responsibility for the enforcement of this "Renegotiation Act of 1948"[23] which the office helped to develop at the request of the Congressional Committee, is vested in the Secretary of Defense.

Although the regular appropriations to the Military Establishment for the fiscal year 1949[24] were not subjected to renegotiation, in another

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[20] 25 Op. Atty. Gen. 105, 2 Jan. 1904.
[21] Opinion No. 132, 40 Op. Atty. Gen., 8 Jan. 1948.
[22] Pub. Law 547, 80th Cong.; approved 21 May 1948.
[23] *Id.* Sec. 3(f) and (i).
[24] Pub. Law 766, 80th Cong.; approved 24 June 1948.

law[25] Congress provided that "The Secretary of Defense is authorized and directed, whenever in his judgment the best interests of the United States so require, to direct the insertion of a clause incorporating the Renegotiation Act of 1948 in any contracts for the procurement of ships, aircraft, aircraft parts, . . . entered into by or in behalf of the . . . Department of the Air Force which obligates any funds made available for obligation in the fiscal year 1949." In conformity with this provision, the Secretary of Defense has directed[26] that renegotiation shall be applicable to any procurement of aircraft and aircraft parts from funds made available to the services for obligation in the fiscal year 1949.

Pursuant to the Renegotiation Act of 1948, the Secretary of Defense has set up joint Army, Navy, Air Force renegotiation boards to carry out the provisions of the Act.[27] The prescribed contract clause has been included in the contracts to which renegotiation is applicable, and the boards now are in the process of preparing regulations for administration of the Act.[28]

As a further measure of inter-service cooperation in the field of procurement, there is now in preparation by a joint committee in which the office participates a code of Armed Services Procurement Regulations, six sections of which had been published by January 1, 1949.[29]

### Loyalty and Security

Since its inception the Department of the Air Force has been responsible for the loyalty of its military personnel and the safety of its information vital to national security. Transfer Order 19,[30] effective September 1, 1948, extended this responsibility to civilian employees of the Department and Transfer Order 22,[31] effective the same date, imposed a similar security responsibility on the Department with respect to contractors' employees who are engaged in performing work for it.

Nowhere is the necessity for keeping military secrets more essential than in the Department of the Air Force where operational plans and research and development together will very likely determine the shape of any future war. On the other hand, it is vitally important that an individual accused of disloyalty be given every opportunity to defend

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[25] Sec. 401, Pub. Law 785, 80th Cong.; approved 25 June 1948, "Second Deficiency Appropriation Act, 1948."

[26] 13 Fed. Reg. 8640; 29 Dec. 1948.

[27] 13 Fed. Reg. 4522; 5 Aug. 1948.

[28] The first two parts of such regulations were published in 13 Fed. Reg. beginning at page 8640. (Dec. 29, 1948).

[29] 13 Fed. Reg. 3074, *et seq.*, 9 June 1948; 13 Fed. Reg. 4914, *et seq.*, 25 Aug. 1948.

[30] See Table of Transfer Orders, *supra.*

[31] See Table of Transfer Orders, *supra.*

himself consistent with the military security requirement. The Office of the General Counsel has devoted considerable time to a study of the problem in an endeavor to set up in the new Department a system which will provide the ultimate in safeguards on both sides of the case, and has reached the basic conclusion that a clear distinction must be made between "loyalty" on the one hand and "security" on the other.

Under the President's loyalty program,[32] which is applied to civilian employees of the Air Force, a final determination that the individual under investigation is, in fact, disloyal is hedged about with extensive safeguards. Once that has been determined, however, the procedure provides for his discharge from the Federal service, even though he does not hold a position of trust and confidence and is not in a position to steal secrets or affect policy decisions, on the basis that the United States does not desire disloyal citizens in its employ.

A security risk, on the other hand, cannot be trusted with secrets for any one of a number of reasons which may well cast no reflection whatsoever on his loyalty, such, for instance, as extreme bad judgment, excessive boastfulness, or unwise choice of associates. Such individuals may have to be removed from their contact with so-called "sensitive" projects immediately but in a manner which will not stigmatize them as disloyal nor prevent their future employment in any position where their known shortcomings will not endanger the security of the country. Special wartime statutes authorizing summary removals and suspensions for security reasons are still in effect for the so-called sensitive agencies — the military and State departments[33] — and a new law to extend this power into peacetime has been under consideration by Congress.[34]

In the case of military personnel, a loyalty removal program alone appears to be sufficient. The Air Force cannot have in its midst disloyal uniformed personnel. On the other hand, control by a military service over its uniformed personnel is so complete that an individual known as a security risk can easily be assigned to peeling potatoes or, in the case of officers, an equivalently "safe" job. In the case of the employees of contractors, many of whom perform work of a highly confidential nature in the research and development or production of new weapons, the essential element is the maintenance of secrecy on military projects quite aside from questions of abstract loyalty to the United States. Therefore, what is needed here is a broad program providing for the removal from work on a confidential Government

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[32] Executive Order 9835, 12 Fed. Reg. 1935 *et seq.*, 25 March 1947; Civil Service Commission Loyalty Regulations, 13 Fed. Reg. 9361, *et seq.*, 31 Dec. 1948.

[33] Pub. Law 808, 77th Cong., Sec. 3, 46 Stat. 1053, 5 USC, 652 note; State Dept. Appropriation Acts for 1947, 1948 and 1949, 60 Stat. 446, 458, 61 Stat. 279, 288, and Pub. Law 597, 80th Cong., 3 June 1948, respectively.

[34] S. 1561, 80th Cong., passed by Senate, 1 June 1948 (94 Cong. Rec. 6780) but not by House of Representatives.

contract of an individual who is a security risk for any reason, with full freedom to the employer to utilize him anywhere else in his plant if he can do so without danger to military security. The category of civilian employees of the Department, however, requires both types of program. Here the Government desires to discharge disloyal personnel from the United States payroll and also to prevent leakage of confidential information by removing individuals who are security risks and assigning them, if possible, to some non-sensitive duty.

The procedure used to effect removals of individuals in each of the categories listed above has in the past been different. In view of the fact that a man is equally stigmatized whether he be discharged from the military service as disloyal or fired from his position as a civilian employee of the Department for the same reason, the standards and procedures for these categories should be substantially the same. So also, to the extent possible, should be the standards and procedures governing security removals of contractors' employees and civilian employees of the Department.

A careful distinction between the types of programs which apply to each class of persons, will constitute a long forward step in protecting those things which we want to protect. It will simplify the protection of military information by the relatively easy elimination of security risks with a minimum of stigma involved, and will insure that the individual who is discharged because he is a security risk will not be stigmatized as disloyal because of the failure to distinguish clearly between the two.

Coincident with its assumption of responsibility for loyalty and security, the Air Force issued a regulation embodying the principles developed out of the study made in the office and prescribing the procedures for dealing with its civilian employees concerning whom there is a question.[85] Programs for the other two categories of personnel are still under consideration.

### Other Matters

In addition to the problems dealt with at some length above, the Office of the General Counsel has devoted time and thought to a number of other matters some of which grew out of transfer transactions and some of which just grew. Membership on the legal subcommittee of the Air Coordinating Committee is one such; although the fact that the great majority of legal problems arising there relate purely to civil aviation necessitates that the official participation of the Air Force representative be minimal. Some of the aspects of international law bearing on Air Force overseas operations, such as questions arising out of the Base Lease Agreement, have on occasion

[85] Air Force Regulation No. 40-12, 15 Sep. 1948, originally published 1 Sep. 1948.

been referred to the office for opinion, as have the legal aspects of the various foreign aid programs. It must also pass on the legality of all Air Force real estate transactions.

Although prognostication is always dangerous, particularly on the basis of only a little more than a year's experience, it can safely be hazarded that for the immediate future the pressure of legal business on the office in connection with procurement and long-range legislative planning will continue or even increase. On the other hand, it can be expected that the loyalty and transfer programs will require less attention as, on the one hand, the loyalty problems change from those of developing a new program to monitoring an approved procedure and, on the other, the transfer process approaches completion.

Those of us who are now in the office hope that it has assisted in the provision for the Air Force of more effective raiment than that with which it started life and thereby contributed slightly to the cause of national defense and world peace.

# SOME PROBLEMS INVOLVED IN REVISION OF THE WARSAW CONVENTION

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THE Legal Committee of the International Civil Aviation Organisation at its Second Meeting at Geneva in June 1948, resolved that revision of the Warsaw Convention was necessary, that immediate study with a view to revision should be undertaken and that a new draft Convention (based on the draft prepared by the author in December 1946 for the C.I.T.E.J.A.) should be prepared together with a Report thereon, for submission to the Committee. At the same time, the Committee appointed a Sub-Committee (of which the writer is Chairman) to deal with the matter and prepared a series of fifteen instructions and questions, the latter required to be answered, if possible, at the next Meeting of the Committee. They were answered at the Meeting of the Committee at Lisbon in September 1948.

Although a number of questions of principle have been provisionally agreed since January 1946, there remain several problems of major importance which require solution,[1] in addition to numerous less important or subsidiary questions, before it will be possible to finalise the draft of a new Convention for consideration by Governments. Within the scope of this article it is possible only to comment upon some of the most important and interesting questions involved.

The Legal Committee desired the Sub-Committee to make provision for the scope of the new Convention to be extended as widely as possible in order that the rules relating to liability of the air carrier might be applicable upon the broadest possible international basis. In the course of its studies the Sub-Committee considered at least eight different methods by which the scope of the existing Convention could be extended. It should be noted that at present the

[1] See Knauth, *Some Notes on the Warsaw Convention*, 14 J. Air L. & C. 44 (1947); Beaumont, *Some Anomalies Requiring Amendment of the Warsaw Convention of* 1929, 14 J. Air L. & C. 30 (1947); Parker, *Adequacy of Passenger Liability Limits in the Warsaw Convention*, 14 J. Air L. & C. 37 (1947); Wetter, *Possible Simplification of the Warsaw Convention Liability Rules*, 15 J. Air L. & C. 1 (1948).

definition of "international carriage" to which the Convention is applicable means roughly carriage which, according to the contract, is between two contracting States or between two points in the same Contracting State with an agreed intermediate landing in another State.

The author originally suggested extending this principle by making the Convention applicable also to carriage operated by any national of a Contracting State, provided that the point of departure or the point of destination was in a Contracting State and any landing was contemplated in any State other than the State of departure. This suggestion did not find favour with the Sub-Committee, which propounded three new suggestions – the first based upon any of the points of departure, destination or intermediate landing being in different States, one of which must be a Contracting State; the second based upon the points of departure and destination being in different States, one of which must be a Contracting State or the points of departure and destination being in the same State with an agreed landing in another State; and the third based upon the inclusion of any carriage passing out of a Contracting State over another State or the high seas.

### Practical Difficulties

There are practical difficulties associated with all these proposals, mainly owing to the fact that Courts of non-Contracting States in which actions might well be brought would not be likely to recognise and apply the rules of the Convention. The third suggestion would also have the effect of involving unnecessary interference with national laws which regulate flights between two points in a State even when passing over another State or the high seas. In this connection it should be mentioned that, for the purpose of all these proposals, the territory of a Contracting State would comprise all the territories for the foreign relations of which the State concerned is responsible, this being the formula adopted in the Convention concerning the International Recognition of Rights in Aircraft signed at Geneva in June 1948.

An entirely new principle was suggested by Brigadier R. O. Wilberforce of the United Kingdom. This was that the Convention should apply to any air carriage under a Contract which is governed by the law of a Contracting State (including of course Convention carriage), except carriage wholly within a Contracting State, unless the State concerned waived this exception. This suggestion is most interesting because it constitutes a new method of approaching the problem and may be found to solve this more satisfactorily than other methods.

Yet another formula has been submitted by the author for consideration. This is based upon the nationality of the aircraft, and the places of departure and destination being in different States (Con-

tracting or not) or in the same Contracting State with an agreed landing in another State. It is suggested that this formula would reduce the difficulties in connection with jurisdiction and enforcement of the Convention rules which are inherent in some of the other suggestions, and it would greatly extend the scope of the existing Convention because nearly all aircraft operating internationally are registered in Contracting States.

It remains for the Legal Committee of the I.C.A.O., and ultimately Governments, to decide which of these suggestions, or any other, to adopt. It is possible that two or more of the principles referred to might be incorporated in the final solution.

### Definition of "Period of Carriage by Air"

The definition of "Period of Carriage by Air," which is of great importance, caused the author, as Reporter, considerable trouble. Ultimately the Committee agreed with him that it is essential to have a different definition for passengers on the one hand and cargo and registered baggage on the other hand, because the latter travels from airport of departure to airport of destination wholly within the custody of the carrier, including any surface transport involved in connection with transhipment, etc.; whereas passengers on long journeys may pass wholly outside the control of the carrier's employees and act as free agents during landings en route. Consequently the Convention rules should be applicable only during those portions of the journey during which passengers remain within the control of the carrier or his employees.

A certain difficulty arose in connection with forced or accidental landings in the sea or desert regions. It was felt that the carrier should be responsible in such cases until the passenger reached a place of safety. The latter proved very difficult to define, and eventually it was provisionally agreed that the difficulty could be overcome by providing that damage arising from, or attributable to, an accident or occurrence during the period of carriage by air should be deemed to have been sustained in an accident which took place during the period of carriage by air. This would take care of the case when a passenger suffered damage between the forced or accidental landing and the time when he reached a place of safety.

The Committee decided that the rules of the Convention should not be extended to surface carriage between airports and town centres, mainly because this would have the effect of interfering unnecessarily with domestic laws governing such carriage.

### Limitations and Bases of Liability

Much consideration has been given to the question as to what conduct of the carrier and his employees should subject him to unlimited liability, in other words, disentitling him to take advantage of

those provisions of the Convention which limit his liability. The Legal Committee had already expressed the opinion that the existing provisions of Articles 3 (2), 4 (4) and 9 of the present Convention are too onerous, and inappropriate to deal with cases of missing or defective traffic documents. The general opinion was that unlimited liability should be involved only if the carrier, or an employee of his, is guilty of a wrongful act or omission, done with knowledge of its wrongfulness and with intent to cause damage; and that these are the only circumstances which should involve removal of the limits of liability. A formula is being devised to incorporate this principle, instead of using the expression "wilful misconduct" (dol), because the latter has caused doubts and difficulties, partly because translations from the English and French texts have not in all cases followed the concept involved, and partly because there appears to be a tendency in some Courts to construe negligence or gross negligence as wilful misconduct.

The Legal Committee agreed in principle that the existing basis of liability should be maintained, namely liability based on negligence, but with the burden of proving that he had taken all necessary measures to avoid the damage being cast upon the carrier. This is a variant of the normal principle most valuable to claimants, but almost inevitable because of the difficulty of obtaining any evidence capable of proof in many air accidents. The incorporation of this principle is the main justification for placing modest limits upon the carrier's liability.

The question of limits of liability is one rather of policy than of law, and the Committee decided to circulate to Governments a short Questionnaire with a view to obtaining definite information concerning policy before attempting to reach conclusions. It is known that some Governments consider the existing limits too low, especially in the case of death or injury of passengers. On the other hand, some States appear to have refrained from ratifying or adhering to the present Convention because the limits are considered to be too high. Furthermore, some Contracting States think that the existing limits for cargo and registered baggage are too high. The main objective of a new Convention is to ensure that the largest possible number of States will become Contracting parties in order that the rules of the Convention may be applicable as widely as possible. It must also not be overlooked that any increase in limits must increase insurance premiums covering the risk of liability; that increase in premiums must increase the cost of carriage; that many passengers are not concerned with damages in the event of death, either because they have no dependents or because the latter are well provided for by means of insurance or otherwise; that some dependents suffer no financial damage through a death; and that insurance of the risk of death or injury can be effected by passengers for individual journeys at very

modest premiums. These and other points have been mentioned in a Commentary annexed to the Questionnaire addressed to Governments; and answers to this are awaited.

### Charter Flights

The existing Convention makes no mention of Charters. It is considered desirable that clear rules should be incorporated in the new Convention regularising the respective positions of owners or operators on the one hand and charterers of an aircraft complete with operating personnel on the other hand; also dealing with the respective obligations of the parties according to whether the charterer is really in the position of a passenger or in the position of a party using the chartered aircraft for his own benefit on a commercial basis. An entirely new Article on this subject has been incorporated in the new draft.

### Negotiability of Air Waybills

It has been suggested that the new Convention should include provisions for making consignment notes (air waybills) negotiable. As the Convention deals with rules concerning the air carrier's liability, the writer considers that it would be inappropriate to include provisions concerning negotiability of consignment notes. The Convention leaves owners of cargo and carriers free to have consignment notes in any form they like, merely prescribing that certain specific particulars and information must be included therein. Consequently it is open to owners of cargo and carriers to make whatever arrangements they like concerning traffic documents and their negotiability, if desired. Nevertheless, there has been included in the new draft an Article to make it clear that there is nothing to prevent the consignor's or the consignee's copies of the consignment note, or both, being made negotiable. As the latter document must travel with the cargo, and no speedier means of despatch is available, negotiability of the consignee's copy would not seem to have much, if any, practical value.

### Other Significant Questions

The new draft also includes provisions for "Valuable Articles" to be treated in a special manner, following the principle which has been applied in other forms of carriage. It is not anticipated that this matter should create serious difficulty.

Article 24 of the present Convention leaves open various legal doubts and difficulties. Therefore an entirely new Article has been suggested to provide (a) for the case when two or more parties are entitled to claim in respect of the same death, injury, loss, damage or delay and (b) for the law to be applied in case the matter is not covered by the national law of the Court trying the action, both in the case of death and in the case of all other claims.

It is also suggested that provision should be inserted for staying actions in certain Courts when actions by or on behalf of the same passenger or owner of cargo are begun before more than one Court; and for consolidation of actions.

It is also proposed to add provisions to the existing Article 27 (No. 29 in the new draft) specifying the parties entitled to claim in the event of the death of a passenger, who shall be entitled to give receipts and discharges; and also providing for (a) the case in which there is no legally appointed representative recognised as such by the Court trying the action, (b) payment of damages to the competent authority in the State of the Court concerned, and (c) the case in which actions arising from the same death are brought before the Courts of more than one State.

The above remarks deal only with some of the many questions which arise in connection with the preparation of a new draft Convention; but they include the main problems and will give some idea of the important questions of principle and law which are involved, and the revision or incorporation of which are considered necessary or desirable in connection with the proposed new Convention.

# REALIGNMENT OF THE DOMESTIC AIR-LINE ROUTE PATTERN—PART II*

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## III. Summary and Critique of CAB Decisions

An analysis of acquisition and transfer cases would seem to indicate that in many cases the Civil Aeronautics Board has not fully recognized its duties and responsibilities under the Civil Aeronautics Act. The general procedure has been first to consider the relationship of the route to be transferred to that of the acquiring carrier and the domestic route pattern as a whole. But in some cases the Board has completely ignored this responsibility or deemed it to be of little importance;[77] in other cases it has seemed to be more concerned with provisions of Section 408 (b) regarding competition than with the effect of the acquisition on the overall route pattern.[78]

If the Board found acquisition to be desirable in either respect it then turned to its second consideration, that of valuation of the property to be transferred, including certificates. Here again the opinions are marked by an inconsistency and vacillation in policy that makes any generalization impossible. The Board, in the *First Marquette* and *Northeast* cases, made definite findings and statements of policy concerning valuation, only to make an about-face and in supplemental opinions to approve the valuation previously condemned. In the *First Marquette* and *National-Carribean* cases, the Board made very definite statements concerning the evils of permitting value to be placed on a certificate for transfer purposes, yet subsequent opinions reveal nothing more than lip service to these former doctrines. Similarly, although the Board had established the policy of abolishing finder's fees and commissions in connection with transfers, later, as pointed out by the dissent to the *Western-Inland* decision, the Board failed to follow through with it.[79]

A common factor found in all the cases approving valuation of a certificate for transfer purposes is the restriction the Board has imposed in the provisions that (1) price for intangibles must be written off to earned surplus and that (2) the approval of valuation in the transfer proceeding does not determine value for rate base or other purposes. The adequacy of this so-called safeguard was the subject of disagree-

* Continued from Autumn issue, 15 J. Air L. & C. 409.

[77] *Western-Inland*, note 35 *supra*.

[78] *United-Western*, note 21 *supra*; *American-Mid-Continent*, note 48 *supra*.

[79] *Western-Inland*, note 35 *supra*, (dissenting opinions of Members Warner and Branch).

ment between Mr. Landis and the majority of the Board. Only in the light of future developments can one properly evaluate the arguments on both sides of this issue.

One cannot help but note the vigilance of labor and its intervention in the principal acquisition cases. This fact would seem to indicate that in all cases involving the transfer of any substantial operation, following the pattern set in the field of railroad transportation, the rights and interests of labor will be protected. If the services of available labor are to be fully utilized with maximum efficiency and economy, it would appear to be most desirable and advantageous to make as many route transfers, consolidations and mergers as possible during the developmental stage of air transportation. This is to be preferred to waiting until air transportation has become overexpanded with the result that diminished service and consequent unemployment would follow approval of any route acquisition and transfer. This fact points to the need for effective and complete governmental control with power in the Board to initiate desirable transfers instead of merely passing judgment on air carrier proposals to do so. That the Board has such power, but has never exercised it was suggested by Mr. Landis.[80]

Applicants have been careful to include property purchases, employment agreements, stock transfer arrangements and numerous other items in the certificate transfer transaction. By this technique, manipulation of price and valuation of property transferred have furnished a smoke-screen for valuation of the certificate transferred—the real issue before the Board. In order to prevent the issues from thus being befogged, the practice fostered by Mr. Landis of examining the valuation of each item as related to total price, as a step separate and distinct from the approval of any valuation of the certificate, should be encouraged. In this manner only those transactions essential to the transfer of the route certificate itself would be ferreted out for Board approval under the transfer sections; the approval of all other parts of the "transaction" would be determined in a related but separate proceeding under Sections 408 and 412.

Perhaps the most striking shortcoming shown by the Board is that nowhere has it related its action in approving an agreement to acquire and transfer a certificate to the overall policy of the Act, which is to regulate the air transportation system by means of the certificate of public convenience and necessity. The Board has, however, repeatedly recognized that the airline route pattern can be altered as effectively through consolidation, merger and acquisition as it can be through the issuance of a certificate of public convenience and necessity for a new route.[81] Having gone this far, it is difficult to see why the Board did

[80] *United-Western, supra* note 36, at 342 (Landis, Chairman, dissenting).

[81] See *United-Western, supra* note 56, at 306 where the Board citing the *National-Carribean Atlantic* decision states: ". . . the Board has *ever* borne in mind the fact that the air map of the country can be changed as drastically by such transactions as by obtaining certificates of public convenience and necessity and, where such transactions might result in destroying a balanced route system, approval of the proposal has been withheld." (Emphasis Supplied.)

not recognize further that, if a finding of public convenience and necessity warrants issuance of a certificate initially, and a finding of public interest, a synonymous term, warrants approval of its acquisition and transfer, the Board is actually re-evaluating the changing factors of public interest or convenience and necessity in the light of the directives of the policy section of the Act and reissuing the certificate in compliance therewith. Since valuation and price bid have no part in the original transaction, it would appear to be a miscarriage of justice to permit them to enter into any of the subsequent transactions.

So long as the Board considers price bid, carriers otherwise best qualified for operation of a route on the basis of public convenience and necessity and fitness and ability under Section 401 (d), may be barred from acquiring the same route under Section 401 (i). For instance, it is inconceivable that either Continental, Braniff, or Chicago & Southern could have outbid American for Mid-Continent's certificate.[82] Furthermore, a directive that "franchise value" be considered in determining public convenience and necessity and public interest is specifically lacking from Section 2 of the Act.[83]

Is it not surprising that an administrative body vested with such broad regulatory powers over a government-subsidized industry and specifically directed to act in the public interest would be so reluctant to exercise its powers? The Board has never experimented with the use of powers of the transfer sections in the ten years since passage of the Act.[84] Appendix A, derived from only those cases in which the Board has approved valuation and transfer of domestic route certificates, illustrates the consequences of the Board's policy of permitting a price to be placed on a route certificate.

## IV. Legislative History

Board decisions must be considered in the light of legislative history wherein the meaning and purpose of the directives to the Board were developed. In this manner, one can competently evaluate the Board decisions and possibly point the way for a change in the policy of the Board regarding route transfers.

A fundamental purpose of the 1938 Act was to centralize and obtain more adequate economic regulation of air transportation.[85] This was

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[82] *American-Mid-Continent*, note 48 *supra*.

[83] Note 11 *supra*.

[84] The Board in 1942 recommended to Congress that ". . . the Board be given power to institute investigations, as a result of which it may find that public convenience and necessity require air transportation over new routes, and the Board be authorized to issue certificates, after making such determination, to those who may apply for permission to operate the routes." Annual Report of the CAB 15 (1942). This request has not since been repeated. Apparently the Board's concept of promotion and development of air transportation insofar as route pattern is concerned, contemplates accretion by addition rather than constructive realignment, adjustment, and deletion.

[85] "The proposal in this bill, speaking generally, is, first, to unify the existing agencies of the Federal Government for the control of aviation, assigning duties now exercised by these three departments to the unit authority to be created by

to be accomplished in part through the issuance of certificates of public convenience and necessity. Certificates of public convenience and necessity have been used for many years as a means of regulating public utilities.[86] In creating the Civil Aeronautics Act, Congress drew from the general background of public utility regulation. A primary function of the certificate is to protect the public interest by giving complete control of the airline route structure to the CAB, the administrative body which issued and controlled the certificate. Thus, a concept of regulation which had been tried and tested was adopted for use in the regulation of air transportation.

The first forceful presentation in favor of the issuance of certificates to the airlines was made by the Federal Aviation Commission (FAC). Following the airmail contract cancellations in 1934, this Commission was created to make a thorough examination of the aviation industry and to make recommendations to Congress.[87] An examination of the testimony before the FAC reveals that many persons both in industry and government at that time had very definite ideas concerning the duties of any regulatory commission which might be formed, its policy concerning the issuance of certificates of public convenience and necessity, and the extent of its control of the airline route pattern.[88] On the

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this bill. In addition, the bill proposes the very important addition of placing commercial aviation under the economic regulation by the Federal Government." Statement of Clarence Lea, 83 Cong. Rec. 6406 (1938). See also, *Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on S.* 3027, 74th Cong., 1st Sess. 30 (1935); *Hearings before Committee on Interstate and Foreign Commerce on H.R.* 5234 & *H.R.* 4652, 75th Cong., 1st Sess. 24-30 (1937); *Hearings before Committee on Merchant Marine and Fisheries on Section* 4 *of H.R.* 9710, 75th Cong., 3rd Sess. 18-35 (1938).

[86] The certificate has been used not only as a control over entry into business but also has been required for such purposes as extension or abandonment of services and re-entry into a public utility business. Those operators who had been in business prior to the date that certificates were first required were usually either exempted from the requirement of obtaining a certificate or issued one automatically under "grandfather" privileges. The function of the certificate, *i.e.*, to protect users of the service, the consuming public, was implemented by the regulatory commission which evaluated the financial condition and capabilities of the applicant and the need for additional service in light of elimination of needless facilities and unnecessary competition. By elimination of these unnecessary and expensive outlays of capital, the public benefitted directly by obtaining services at the lowest possible rates commensurate with operating efficiency. *Barnes, The Economics of Public Utility Regulation* 229 (1942); *Troxel, Economics of Public Utilities* 49 (1947); 51 C.J. §95; 6 Words & Phrases 431 (Perm. Ed. 1940).

[87] Airmail Act of 1934 §§20 and 21, 48 Stat. 398, 39 USCA §469 (Supp. 1937).

[88] *General William Mitchell* testified that since the government was paying for all the facilities—airports and navigation aids—to help the airlines, the general public rather than a few individuals should get the return from the operations of the airlines. 2 FAC Hearings 628,739. *Captain Eddie Rickenbacker* and ***Jack Frye*** recommended that certificates of convenience and necessity should be issued for a ten year term with power in the regulatory commission to initiate remedial action as well as to control airline action. They recognized the right to purchase certificates or merge routes, but felt that one of the main causes for the airline ills was the continual reshuffling of the airline routes under the airmail contract method of regulation. *Id.* at 821. *Dr. Edward Warner* wanted limitations to be placed on purchases and consolidations in order to prevent monopoly. 1 FAC 378. *Messrs. W. A. Patterson, Lester D. Seymour,* and *Charles B. Munro* all felt that the issuance of certificates to secure a degree of permancy in operation would be most desirable. 3 FAC Hearings 1070, 1083, 1131, 1272. *Mr. W. A. M. Burden* stated that public interest would be served best by the development of a system which would become self-supporting as rapidly as possible. To accomplish

basis of this testimony, the FAC recommended: "All regular domestic and scheduled transport operations should require a certificate of convenience and necessity to be issued by the commission hereinafter proposed."[89] In commenting upon this recommendation the Commission noted:

> ". . . There should be a check on development of any irresponsible, unfair, or excessive competition such as has sometimes hampered the progress of other forms of transport. . . . We can see no way of introducing an adequately flexible control over a rapidly developing art unless the flexibility be extended to commission power to select operators for new routes and to determine from time to time the conditions under which they must render service."[90]

It would appear that the FAC, by issuance of certificates of public convenience and necessity, sought to eliminate cut-throat competition in airmail contract bidding whereby an airline would be flourishing and in business one day and non-existent the next. Note that it made no recommendation concerning duration of certificate or change of route pattern to keep abreast of changes in requirements of service. This problem was purely one of administrative policy to be dealt with by the regulatory body "from time to time."

Following the report of the FAC in January 1935, many bills concerning the regulation of air transportation were introduced in Congress.[91] Inasmuch as none of the bills was passed prior to the 3rd Session of the 75th Congress in 1938, an examination of their content and of the hearings conducted on them is of little more than probative value in obtaining an insight into the philosophy of regulation propounded by government and industry. As will be pointed out later, the bills introduced during this period differed materially in some of their

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this, he recommended a substantial reduction in airline route mileage by the issuance of a five year certificate only to such airlines as required airmail pay subsidy not in excess of 150 per cent of their commercial revenues. 4 FAC Hearings 1868-85. *Mr. Paul Braniff* pointed out that the government had had to bear the burden of the aviation industry for years and that the government regulatory body, by permitting uneconomical competition, was simply increasing the cost to the government, since it paid for the service. *Id.* at 1718. *Mr. Charles Lindbergh* noted the impossibility of drawing a permanent route map because of the many changing conditions involved. He felt that for this reason it was up to the regulatory commission to decide and create the route pattern. 5 FAC Hearings 1855, 1899. *Mr. Thomas B. Doe* stated that because of the government investment in developing the airlines, the government and the airlines were already partners. Therefore, the routes should be under complete control of the government and no permanent certificates should be issued until an airlines became self-supporting. *Id.* at 2064-79. *Mr. William P. McCracken* believed that the airline map and the number of routes to be flown should be determined in the discretion of the regulatory commission. *Id.* at 2167. *Mr. Joseph Ripley* desired that there be no grandfather rights and that certificates be issued only to companies which could demonstrate their ability. In this manner, the new regulatory commission could change the airway map without the encumbrance of existing deficiencies in route pattern. *Id.* at 2184, 2187.

[89] Report of FAC 9, Recommendation 5 (January 30, 1935).

[90] *Id.* at 54-56. The FAC tempered its remarks concerning flexibility with the following statement. "The air transport map cannot be redrawn every few years without utterly disastrous effect on the service. New lines ought to be created on a substantially permanent basis. An air line cannot be casually torn up and transplanted. . . ." *Ibid.*

[91] *Rhyne, Civil Aeronautics Act Annotated,* Appendix A (1939).

provisions from the Act as finally passed by Congress. In general, however, they contained grandfather privileges, consolidation, acquisition, merger and certificate transfer clauses which closely paralleled those of the Motor Carrier Act.[92] Thus a certificate could be transferred pursuant to such rules and regulations as the Commission might prescribe.[93]

The Air Transport Association of America (ATA) actively participated in drafting many of the bills introduced and through the testimony of Colonel *Edgar S. Gorrell,* its President, one may discover the airline position on and interpretation of the proposed legislation.[94] He pointed out that grandfather provisions merely restated the usual policy contained in other regulatory Acts and recognized that the purpose of the provision was to preserve the existing system.[95] Mr. Gorrell felt that competition should be restricted to an extent needed for an orderly expansion of the industry through the issuance or withholding of certificates of convenience and necessity. To him a certificate meant "nothing but an authority to fly between the points specified in that certificate."[96] In commenting on consolidation and merger provisions, he said that through the exercise of sound administrative discretion, desirable economic adjustments could be made without creating dangerous monopolies. Whereas Mr. Eastman, the Federal Coordinator of Transportation and recognized authority on transportation regulation, had expressed the opinion that the consolidation and merger clause should contain a specific phrase about preserving competition, Mr. Gorrell desired that the language follow closely the Motor Carrier Act with the test being "public interest." He explained the operation of this section as follows:

> ". . . Consolidations may be desirable from time to time in the future for a variety of reasons, not the least of which is preventing an economical unit from disappearing in the throes of bankruptcy. Under the proposed legislation a method of bringing about such consolidations is provided . . . which will enable the Commission, in an orderly way, to examine fully into the merits of any such proposal, and to authorize or prevent as the public interest will best be served. Not only is this true of outright consolidations and mergers, but it is equally true of all forms of acquisition of control through direct or indirect means."[97]

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[92] "Any certificate may be transferred pursuant to such rules and regulations as the Commission may prescribe." §305(1) of S. 2 and H.R. 7273, 75th Cong., 1st Sess. (1937).

[93] *Ibid.* and note 119, *infra.*

[94] *Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on S.* 2 & *S.* 1760, 75th Cong., 1st Sess. 223-227; *Hearings before Committee on Interstate and Foreign Commerce on H.R.* 5234 & *H.R.* 4652, 75th Cong., 1st Sess. 52 (1937).

[95] Representatives of the Post Office Department and Bureau of Air Commerce objected to grandfather clauses awarding certificates to present operators as a matter of right. They argued that in this way the air transport field would be monopolized by existing carriers. *Hearings on S.* 3027, *supra* note 85, at 118; *Hearings on S.* 2 & S. 1760, *supra* note 94 at 90, 119, 185, 351, 423; *Hearings on H.R.* 5234 & *H.R.* 4652, *supra* note 94, at 122-126.

[96] *Hearings on H.R.* 5234 & *H.R.* 4652, *supra* note 94 at 277.

[97] *Id.* at 81.

As a result of hearings conducted by an Interdepartmental Committee during the Fall of 1937, bills to regulate civil aviation introduced in the 3rd Session of the 75th Congress in 1938 differed materially both in form and basic policy from those which had been previously introduced.[98] HR 9738, introduced March 4, 1938, the basic bill which, as amended later became the Civil Aeronautics Act of 1938, contained in Section 402 (l) the language now found in Section 401 (i) of the Act.[99] Whereas bills introduced prior to HR 9738 contained certificate transfer provisions, modeled after the Motor Carrier Act, permitting certificates to be transferred under rules and regulations prescribed by the Commission, HR 9738 contained the language of Section 401 (i) permitting only those transfers found to be in the public interest.[100]

*Mr. C. M. Hester,* who participated in the drafting of the bill and later became the first Administrator of the Civil Aeronautics Authority, considered this change to be one of the primary differences between HR 9738 and prior bills.[101] In testimony before the House Committee on Interstate and Foreign Commerce, Mr. Hester explained that the prior provisions did not appear –

> "to be sufficient to authorize the ICC to prohibit the transfer of a certificate in the event that the transfer would be adverse to the public interest. Since, in many cases, the issuance of a certificate may depend upon the ability and integrity of the persons receiving it, it was considered advisable to include a provision which would clearly empower the Authority to prevent an undesirable transfer."[102]

Through the enactment of the Civil Aeronautics Act in 1938, air carriers obtained privileges far beyond their expectations or requests. The main thing they had asked for was a discontinuance of competitive bidding for airmail contracts and a permanent policy of regulation in one federal regulatory agency so that they could acquire capital and conduct their business on a sound basis. Whereas at first the carriers had asked for either temporary certificates pending their showing of adequate service or certificates *for a period of five to ten years, they obtained permanent certificates under the grandfather privileges.*[103] The certificate once obtained, however, could not be transferred or acquired by another carrier without a re-evaluation of the very factors which were considered in its original issuance. That this was the intent of Section 401 (i) is apparent from Mr. Hester's explanation. In this respect, as

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[98] *Hearings before Committee on Interstate and Foreign Commerce on H.R.* 9738, 75th Cong., 3rd Sess. 439 (1938); *Hearings on Section 4 of H.R.* 9710, *supra* note 85, at 19-21.

[99] §402(1) of H.R. 9738 and §401(i) of its companion bill in the Senate, S. 3845, contained the same language as does §401(i) of the Act.

[100] Compare §305(1) of S. 2 and H.R. 7273, 75th Cong., 1st Sess. (1937) with §401(i) of the Act.

[101] *Hearings on H.R.* 9738, *supra* note 98, at 36-41.

[102] *Id.* at 41.

[103] Compare statements made *supra*, notes 88-97, with language of §401(e) of the Act, 52 Stat. 987. 49 USCA §481 (Supp. 1948).

compared with other regulatory acts, the Civil Aeronautics Act would seem to be far more restrictive and to have a greater degree of control allocated to the regulatory agency. Control of the airline route pattern was understood by both industry and legislators to be vested in the CAB through its interpretation of the necessity for competition.

## V. Decisions of Other Administrative Agencies

The Board has repeatedly made statements to the effect that:

> "The reports of the Congressional Committee hearings held prior to the enactment of the Civil Aeronautics Act likewise indicate an intent to provide the same general type of regulation for air carriers as was then provided for railroads and motor carriers and that it was desirable to pattern the Civil Aeronautics Act upon such prior legislation in order to avoid confusion of interpretation, since that legislation was not new or untried but embraced definite policies built up over a period of years."[104]

To support this proposition, the Board usually cites testimony by Mr. Gorrell and Mr. Eastman concerning bills introduced prior to the 3rd Session of the 75th Congress and which in fact were modeled after the Motor Carrier Act and would have placed the regulation of air transportation under the ICC instead of the CAB.[105]

It is submitted that statements such as that made by the Board and quoted above are very misleading and not conducive to the development of a sound interpretation of the Act. As pointed out above, the bills introduced after January 1, 1938, were in many respects totally dissimilar from any of their predecessors both as to specific provisions and general overall policy. The final Act contains directives and confers responsibilities reaching far beyond those found in the ordinary public utility statute. As pointed out *infra,* this is particularly true in the case of Sections 2 and 406. Similarly, in Section 401 (i) an entirely new concept of control intimately linking the transfer of a certificate with its original issuance was incorporated into the Act.

Therefore, the policy of other state and federal regulatory agencies concerning transfer of certificates or operating rights is reviewed here merely to show what has been done under the specific language in other Acts. Through such a comparison it is hoped that the responsibilities and duties of the CAB in transfer cases may be clarified.

The states appear to have regulated the various public utilities by means of certificates of public convenience and necessity many years prior to the adoption of its wide use in federal regulation under the commerce clause.[106] Naturally, the holdings of the regulatory agencies

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[104] *Acquisition of Marquette by TWA*—Supplemental Opinion, 2 CAB 409, 412 (1940)..

[105] *Ibid*: *American Export Lines, Control—Amer. Export Air.*, 3 CAB 619, 628 (1942); *American Export Lines, Control—American Export Air.*, 4 CAB 104, 107 (1943); *American President Lines et al., Petition*, 7 CAB 799, 804 (1947); *cf. Id.* at 816, (Landis, Chairman, dissenting), where the distinction between the Act as finally passed and prior legislation is made in part.

[106] Note 86, *supra.*

vary from state to state depending upon variation in language of the respective statutes under which they function. Generally, the states have refused to approve a transfer to a purchaser who was wholly insolvent and have held such transfers to be unreasonable and unlawful.[107] Transfer agreements containing restrictive and non-competitive terms have been specifically disapproved.[108] In order to have the transfer of a certificate of convenience and necessity approved, it has not been necessary that any equipment be transferred.[109] All transfers of certificates were to be strictly scrutinized as to their effect upon the carrier industry as a whole.[110]

The various state regulatory agencies are divided on the question of whether or not a certificate may be split either into different types of operating rights or into segments of the route certificated to allow a partial transfer of the certificate. The majority would seem to disfavor splitting a certificate on the basis of strict statutory interpretation, by holding that general statutes authorizing transfer of a certificate do not give the commissions power to approve transfer of only a part of a certificate.[111] The only way this can be accomplished is for the commission to grant a new certificate for the particular type of operation or segment of the route which the applicants desired to transfer. Those states which have permitted partial transfers have done so on the basic assumption that a deviation from the general rule was justified where the public interest would benefit from more efficient, economical and improved service.[112]

The state commissions in general deal with the question of valuation in transfer cases in much the same manner as does the ICC. They permit a reasonable sum to be written off to surplus where the purchase price exceeds the value of property or assets transferred and where it has been shown that the ability of the transferee to render adequate service will not be impaired by the acquisition.[113] The various commissions, however, have been very outspoken in their refusal to permit certificate transfers at inflated prices.[114]

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[107] *Penna. R. Co. v. Pub. U. Comm.*, 116 Ohio St. 80, 155 N.E. 694 (1928).

[108] *Re Pacific Greyhound Lines*, 37 Cal. R.C.R. 517 (1932).

[109] *Re Schwank*, P.U.R. 1933B, 410 (Colo., 1932).

[110] *Re Davis*, P.U.R. Dig. 201 (Cum. Supp. 1947-1948).

[111] *Houston & N. Texas Motor Frgt. Lines v. Johnson*, 159 S.W. 2d 905 (Texas 1941); *Re Sacramento Northern Railway*, 38 P.U.R. (NS) 319 (Cal. 1941); *Re Coast Line Express*, 57 P.U.R. (NS) 434 (Cal. 1944); 434 (Cal. 1944); *Re Foster*, P.U.R. Dig. C §140 (Colo. 1946).

[112] Splitting of certificates has been approved in the following cases: *Re Braddock*, 31 P.U.R. (NS) 171 (Ohio 1939); *Re Indianapolis & S. E. R. Co.*, P.U.R. 1933A, 293 (Ind. 1932); *Re Eaton*, P.U.R. 1933C, 281 (N.Y. 1932); *Re Blabon*, P.U.R. 1923C, 1 (Cal. 1922); *Re Kielhofer*, P.U.R. 1923C, 675 (Cal. 1923); *Re Bacon Service Corp.*, 30 Cal. R.C.R. 722 (Cal. 1927); *Re Motor Transit Co.*, 36 Cal. R.C.R. 85 (Cal. 1931); *Re Wabash Valley Coach Co.*, 1 P.U.R. Dig. §140 (Ind. 1930); *Re United Motor Transportation Lines*, 43 Cal. R.C.R. 69 (Cal. 1940).

[113] *Ibid* and Note 111, *supra*.

[114] In New York where a bus franchise had been purchased from a municipality it was held to be contrary to public policy to permit the transfer of the franchise for a payment in excess of the amount paid to public authorities. (*Re*

Inasmuch as the Board's opinion in the *United-Western* case contains a summary of the policy of the ICC and Federal Power Commission (FPC) with respect to price, little could be gained by reviewing their decision.[115] That part of Section 8 of the Federal Power Act pertinent to this discussion reads:

> "No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission . . . (and such license) shall be . . . subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee. . . ."[116]

In proceedings under this provision, the FPC has held that its power to approve transfers were no broader than its power to issue licenses in the first instance and a prospective transferee must be able to qualify in all respects as an original transferee.[117] In the purchase of utility assets and facilities, the excess of the purchase price over valuation of assets transferred must be charged immediately to reserve created out of capital surplus.[118]

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*Eaton*, P.U.R. 1933C, 281 (N.Y. 1932). Under this theory, public interest would appear to react even more strongly against permitting a payment for a franchise which had originally been issued gratis by public authorities. Other state commissions have recognized that no dependable transportation system can be established and developed when individuals are permitted to speculate in certificates of convenience and necessity. (*Re Grier*, P.U.R. 1922C, 131 (Cal. 1921); *Re Evansville Suburban & N. R. Co.*, 65 P.U.R. (NS) 500 (Ind. 1946); *Re East Penn Transp. Co.*, 41 P.U.R. (NS) 316 (Pa. 1941). Likewise, they have stated that the sale of operating rights should not be permitted when the result would be that shippers using the service would be obliged to pay rates which would provide funds for the purchase of a right which was granted originally by the state without charge. (*Re Clark*, P.U.R. 1922D, 491 (Cal. 1921). In 1941, the Pennsylvania Commission held that authority to transfer motor carrier rights under a certificate of public convenience and necessity at an excessive purchase price, to be paid for operating rights and goodwill and not for tangible physical property, should be denied, regardless of present earning power of the route and willingness of the purchaser to charge the sum to surplus or some other account. (*Re East Penn. Transp. Co.*, 41 P.U.R. (NS), 316 (Pa. 1941). Only recently, the Indiana Commission found that the primary purpose in the issuance of a motor carrier certificate of convenience and necessity was the establishment of a service between points or within a territory where either no service exists or existing service is inadequate to meet the needs of the shipping public, and not the creating of a salable asset which the holder thereof can hold without rendering any service and sell at his pleasure disregarding needs of the public. (*Re Evansville Suburban & N. R. Co.*, 65 P.U.R. (NS), 500 (Ind. 1946).

115 *United-Western, Acquisition of Air Carrier Property*, 8 CAB 298, 346 (1947).

116 41 Stat. 1068, 16 USCA §801 (Supp. 1948). It is submitted that the results of citing decisions of other regulatory agencies without analyzing the statutory language under which they are made are as detrimental to formulation of a sound regulatory policy as the practice commented upon in notes 104-105, *supra*.

117 *Broad River Power Co. & Lexington Water Power Co.*, 1 FPC 363 (1937).

118 *Pennsylvania Electric Co.*, 3 FPC 557 (1943). The FPC orders without opinion approving license transfers are numerous. Transfers are generally made subject to §8 of the Federal Power Act and to the Commission's Rules and Regulations. *Kentucky Utilities Co.*, 1 FPC 788 (1939); *Pennsylvania Electric Co.*, 3 FPC 656 (1942).

Section 212 (b) of the Motor Carrier Act provides that:

> "Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."[119]

The Transportation Act of 1940 repealed Section 213 of the Motor Carrier Act after which Section 408 of the Civil Aeronautics Act had been modeled.[120] Its provisions were incorporated into Sections 5 of Part I of the Interstate Commerce Act mentioned in Section 212 (b).[121] Section 5 regulates all combinations and consolidations of carriers.[122] Thus the ICC is directed to consider the requirements of Section 5 in any proceeding under Section 212 (b).

The regulations promulgated by the ICC to control the transfer of operating rights provide that a certificate may be divided as to routes or territories and class or classes of property authorized to be transported so long as that part of the operating rights sought to be transferred is clearly distinguishable and severable from the remaining operating rights, is different in the nature or type of service to be rendered and does not create duplicate operating rights.[123] The Commission recognizes that the lease of operating rights is a type of transfer.[124] Therefore, leases of operating rights are also brought under ICC approval by the regulations, and in case of reversion or discontinuance of operations, the Commission must be notified immediately.[125] On court review it has been found that consolidation of motor carrier rights was properly authorized where evidence supported findings that the consolidation would bring about economies and more efficient operation, improve service, leave ample competitor motor carrier service in the area affected, and would be in the public interest, although such findings do not negate the possibility that the merger would not be in accord with all provisions of the Federal anti-trust statutes.[126]

As pointed out in the *United-Western* case, both the ICC and the FPC permit the transferee to charge off to surplus, write-ups created by acquisition prices in excess of value of property transferred.[127]

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[119] 49 Stat. 555, 49 USCA §312 (Supp. 1948).

[120] 54 Stat. 924, 49 USCA §313 (Supp. 1948); 54 Stat. 905, 49 USCA (Supp. 1948); LOCKLIN, ECONOMICS OF TRANSPORTATION, 267 (1947).

[121] *Ibid.*

[122] *United States v. Resler*, 313 U.S. 57 (1941); *United States v. Marshall Transportation Co.*, 322 U.S. 31 (1944).

[123] 49 Code Fed. Regs. §179.1(e) (Cum. Supp. 1943).

[124] 49 Code Fed. Regs. §179.4 (Cum. Supp. 1943). "Applicants who seek approval of a transfer of operating rights for a limited period, whether by lease, operating contract or otherwise. . . ."

[125] *Ibid.* "In case of reversion, the transferor shall give immediate notice thereof to the Commission."

[126] *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

[127] Perhaps the best expression of the result of this practice is found at page 12 of the Annual Report of the Greyhound Corporation to its stockholders for the year 1946. There the directors present the shareholders with the following infor-

The Federal Communications Commission (FCC) is given jurisdiction over acquisition and transfer of radio station licenses under Section 310 (b) of the Communications Act of 1934:

> "The station license . . . and the right therein granted shall not be transferred, assigned, or in any manner . . . disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said *transfer is in the public interest*, and shall give its consent in writing."[128]

This language closely approximates that of Section 401 (i), as "public interest" is the yardstick for FCC action. It should be noted, however, that the Communications Act contains no section comparable to Sections 2 and 406 of the Act.[129] The licenses subject to transfer are granted for a period of from three to five years.[130] The FCC has refused to approve a transfer whereby the transferor retained a reversion, on the basis that once broadcast rights had been transferred, the former owner should receive no preference as compared to other applicants upon expiration of the term of the station license.[131]

The FCC has stated that the legislative history of Section 310 (b) shows that the legislative intention was that the Commission would prevent the transfer of a license to a person who would not be qualified to receive a license in the first instance or to disapprove of a proposed transfer, when, in light of all the facts, public interest would not be served thereby.[132] The FCC has followed the practice of determining original cost, depreciated value and reproduction cost of all tangible property to be transferred.[133] Generally, transfers have been approved permitting payment of acquisition prices in excess of any of these

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mation: "Pursuant to orders of the ICC approving acquisitions during 1946, the companies were required to write off $739,546.00 against Earned Surplus, being the amount by which the purchase price exceeded the net book value of the tangible assets acquired. This brings the total to date of such write-offs to $5,367,-886.00." One cannot help but feel that such a statement would seem to be completely out of place in the annual report of a member of an industry in which fair return on investment is guaranteed by air mail pay subsidy allocated by the same regulatory body which has comprehensive control of the acquisition and transfer of certificates.

[128] Communications Act of 1934 §310, (d), 48 Stat. 1085, 47 USCA §310 (Supp. 1948).

[129] This fact was also noted by Mr. Landis. *United-Western, supra* note 115, at 334 (Landis, Chairman, dissenting).

[130] Communications Act of 1934 §307(d), 48 Stat. 1083, 47 USCA §307 (Supp. 1948).

[131] *Alabama Polytechnic Institute*, 7 FCC 225 (1939).

[132] *Falknor & Schepp*, 10 FCC 401, 404 (1944).

[133] *Lancaster Broadcasting Service, Inc.*, 2 FCC 154 (1935); *Walker, et al.*, 5 FCC 234 (1938); *Merced Star Publishing Co., Inc.*, 7 FCC 137 (1939).

amounts.[134] But where write-up for tangibles appears to be unreasonable, the Commission has found the assignment not to be in the public interest.[135] It has done so on the basis of Supreme Court decisions holding that past losses could in no way be capitalized for rate making purposes.[136]

It is interesting to note that under a statute similar to the Civil Aeronautics Act, the FCC, unlike the CAB, does not permit the transfer of a license with strings attached such as a reversion to the transferor, and intimately links its action in approving a transfer to the original issuance of the license.[137] On the question of valuation, Mr. Landis would distinguish its responsibilities from those of the CAB on the basis that the FCC is dealing with an industry that is not a common carrier and whose earnings are not subject to public regulation.[138]

## VI. Unique Characteristics of the Civil Aeronautics Act

In addition to those conclusions which may be drawn through a study of the CAB decisions, the legislative history of the Civil Aeronautics Act and a comparison of the statutes and decisions in other fields of public utility regulation, there are additional reasons to compel the conclusion that present policy of the Board regarding transfer of certificates of convenience and necessity should be revised. Distinguishing features of the Civil Aeronautics Act favor unique treatment by the Board of the issues involved in valuation and transfer of certificates of convenience and necessity.

There are many distinguishing features of the Act which place a greater duty upon the Board to act affirmatively and with initiative in regulating air transportation and to ignore precedent in other fields. The policy section of the Act is unique in the field of transportation regulation.[139] Under its terms the Board is directed to foster the devel-

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[134] *Pacific Radio Corp.*, 5 FCC 427 (1938) ($14,000.00 for property with present value fo $9,029.66); *Walker, et al.*, 5 FCC 234 (1938) ($21,000.00 for property with present value of $8,895.53); *Albert Stienfield & Co.*, 6 FCC 714 (1939) ($35,000.00 for property with replacement value of $29,640.54).

[135] *Travelers Broadcasting Service Corp.*, 6 FCC 456 (1938) (One member dissenting.)

[136] *Ibid.* The logic of the dissenting opinion is similar to that of the majority of the Board in the *United-Western* case.

[137] Primary considerations in any case are the legal, technical and financial qualifications of the transferee and improvement in service. The FCC has stated that the legislative history of §310(b) shows that its purpose was to empower the Commission to prevent the transfer of a license in the first instance. *Falkner & Schepp*, 10 FCC 401, 404 (1944). The FCC has promulgated Rules and Regulations similar to those of the ICC which control all acquisitions and transfers of station licenses. A notable feature of the FCC Regulations is that any party is permitted to file an acquisition plan for consideration by the Commission after an original application has been received. 47 Code Fed. Regs. §1.321 (Supp. 1946); *Id.* (Supp. 1947).

[138] *United-Western*, *supra* note 115, at 334 (Landis, Chairman, dissenting).

[139] This fact has been recognized by the Board that it does not warrant citation. For an analytical and interesting discussion of the relationship of the declaration of policy found in §2 of the Act to the Nation's over-all transportation policy, see Young, *A National Transportation Policy*, 12 Law & Contemp. Probs. 621 (1947).

opment of air transportation. The Board is not only given authority to regulate air transportation but is required to encourage and promote its growth to meet the nation's needs. Assuming sound management, the statute assures air carriers of a fair return on investment.[140]

Other facts concerning the Act also would seem to compel the Board to proceed with caution and deliberation before abandoning control of the route pattern to airline management. For example, the Act contains no long and short haul clause;[141] the Board may not award reparations should an air carrier assess unlawful charges;[142] the anti-trust exemption provisions are much broader under the Act than under the Interstate Commerce Act;[143] the exemption and classification powers of the Board are much broader than the ICC's[144] and in case of an investigation and suspension proceeding, contrary to the provisions of the Interstate Commerce Act, the burden of proof would seem to be on the Board.[145] It is submitted that in any proceeding, such as one involving the valuation of a certificate for transfer purposes, the Board should give serious thought to these factors releasing government's control on a given industry before submitting still further to the requests of that industry to approve inflated valuation of certificates for transfer purposes.

A prime purpose of the Act, as admitted by both the legislators and the industry, was to bring security and stability to the airlines by the establishment of a definite policy of regulation and the elimination of cut-throat competition brought on by the necessity of under-bidding competitors for air mail contracts in order to keep a route system whole.[146] At the various hearings conducted in connection with the passage of the Act the quantitative bulk of the testimony was presented by the Air Line Pilots Association and the ATA.[147] At no time did a member of the public, those who use and pay for air transportation, appear and testify. Representatives of airlines and the ATA actively

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[140] §406 of the Act, 52 Stat. 998, 49 USCA §486 (Supp. 1948).

[141] Interstate Commerce Act, Part I, §4, 41 Stat. 480, 49 USCA §4 (Supp. 1948). The carriers have placed long and short haul provisions in their tariff rules, published under Part 224 of the Board's Economic Regulations. 14 Code Fed. Regs. § 224 (Cum. Supp.).

[142] Compare §16 of Part I, Interstate Commerce Acts, 43 Stat. 633, 49 USCA §16 (Supp. 1948) with §§404 and 1002 of the Act, 52 Stat. 993, 1018, 49 USCA §§484, 642 (Supp. 1948).

[143] Compare 35 of Part I, Interstate Commerce Act, 42 Stat. 27, 49 USCA §5 (Supp. 1948) with §414 of the Act, 52 Stat. 1004, 49 USCA §494 (Supp. 1948).

[144] Compare §204 of Part II, Interstate Commerce Act, 56 Stat. 176, 49 USCA §304 (Supp. 1948) with §416 of the Act, 52 Stat. 1004, 49 USCA §496 (Supp. 1948).

[145] Compare §15 of Part I, Interstate Commerce Act, 54 Stat. 911, 912, 49 USCA §15 (Supp. 1948) with §1002 of the Act, 52 Stat. 1018, 49 USCA §642 (Supp. 1948). In addition see James, *Regulation of Air Carriers*, 11 I.C.C. Prac. Jour. 382 (1944) and Note, 11 J. Air L. & C. 359 (1940).

[146] Note 85, *supra*.

[147] It is submitted that the number of pages of testimony submitted by representatives of ATA and ALPA total roughly ten times those of any other two parties appearing at the hearings on the various bills leading to passage of the Civil Aeronautics Act.

participated in the drafting of much of the legislation.[148] Thus the passage of the Act was not prompted by the cries of a public long abused and discriminated against by a form of public utility in a superior bargaining position such as brought on regulation of the railroads and other utilities, but instead was the end product of a combined government-industry effort to prevent just such an event from ever occurring. It may be said then that in the Civil Aeronautics Act the airlines "wrote their own ticket" subject to the reservation of certain controls by government to protect the public interest which the public itself had not yet found voice to express. In view of this fact, the necessity of a firm policy on the part of the organization administering the Act becomes more apparent. If the evils of former years and of other industries are not to harass air transportation, the Board must truly regulate in the public interest.

## VII. Conclusion

Having arrived at the conclusion that Board policy regarding certificate valuation and transfer should be revised, we have by no means answered the question of how the airline route pattern may best be realigned and its flexibility maintained. That this latter question is of current significance is apparent from the attention which it received from the President's Air Policy Commission[149] and the Congressional Aviation Policy Board in 1948.[150] These special commissions recognize the fact that the present airline route pattern was unsatisfactory. In order to correct deficiencies in the present pattern they recommend that (1) the route pattern be presently revised and (2) provision be made for maintaining flexibility in the future. Whether or not this can be accomplished spells the success or failure of the administrative process as exemplified by the CAB.

Nothing is to be gained by a sweeping revocation of certificates in repetition of the cancellation of the air mail contracts in 1934.[151] Adjudication before the Court of Claims of damages resulting from the violation of contract and property rights is a poor substitute for affirmative, constructive action by the CAB.[152] The following plan, therefore, would retain complete control of realignment and adjustment of the route pattern in the Board, the expert administrative body created for

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[148] A most elaborate and somewhat irate discussion of this fact may be found in Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on S. 2 & S. 1760, 75th Cong., 1st Sess., (1937) 223-227, 341.

[149] Report of the President's Air Policy Commission, Survival in the Air Age, 110 (1948), reprinted, 15 J. Air L. & C. 756 (1948).

[150] Report of the Congressional Aviation Policy Board, National Aviation Policy, Recommendation 33, 26 (1948), and see cross reference, 15 J. Air L. & C. 208 (1948).

[151] The inadvisability of repetition of action similar to that taken in cancelling the air mail contracts and certificates in 1934 cannot be over-emphasized. Campbell, *Procedural Due Process in the Cancellation of Air Mail Route Certificates*, 21 Wash. L. Rev. 123 (1946); Smith, Airways (1944).

[152] Campbell, *supra* note 151, at 226.

that very purpose.[153] With the exception of the one amendment to the Act, hereinafter recommended, it is believed that the mechanics of the process of route alignment can be accomplished under the present statute.

In order to facilitate steps toward either maintenance of flexibility or revision of route pattern, Section 401 (i) should be amended to permit the splitting of certificates for transfer purposes either as to linear segment of route or type of operation. The following language might be used:

> § 401 (i) — No certificate or any part thereof may be transferred unless such transfer is approved by the Board as being consistent with the public interest. All transfers shall be made in compliance with rules and regulations prescribed by the Board.[154]

It will be recalled that the CAB cited decisions of other administrative bodies to support its position regarding valuation of certificates for transfer purposes. The Board could better profit by following the example of the FCC and the ICC in developing rules under this new Section 401 (i). Thus, leases would be recognized as transfers; reversionary interests would be prohibited; transfers would be recognized as a re-evaluation of public convenience and necessity (public interest) in the light of changing factors; and a re-issuance of the certificate would be authorized to the most competent and logical recipient.

With this new tool at hand to facilitate transfers, the Board should institute a proceeding under Sections 205, 401, 407, 415, and 1002,[155] wherein all the airlines would be required to file with the Board information as to what they believe to be an efficient route pattern for their respective systems; the ATA, Post Office Department, Secretary for Defense, representatives of the Armed Forces, and all interested parties should also file plans of what they believe the requirements of a domestic route pattern should be.

The Board, using the great mass of statistics, operational data, information of the Post Office Department, etc., availible to it, should then commence its own route evaluation study. Before arriving at any conclusion regarding the route pattern to be formulated, the Board should make the following policy determinations.

> 1. The extent of federal regulation ranges from the individual entrepreneur who is comparatively regulation-free, through the public utility and transportation industries where regulation is

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[153] By recommending that a "disinterested non-governmental agency" make a route study and prepare a basic route plan, the Congressional Aviation Policy Board seems to have ignored the fact that the Board maintains the basic data and figures which would be needed for such a study and therefore is in the best position to prepare a basic route plan. Note 150, *supra*.

[154] An attempt has been made to incorporate the desirable features of both §212(b) of the Motor Carrier Act and §310(b) of the Communications Act of 1934 into this proposed amendment of §401(i). Notes 119 and 128, *supra*.

[155] 52 Stat. 984, 987, 1000, 1004, 1018, 49 USCA §§425, 481, 487, 495, 642 (Supp. 1948).

intensive and extensive, to such enterprises as the Postal Service, TVA, and the Inland Waterways Corporation, which may be said to be truly Federally owned and operated. Somewhere along the line, policy determinations and regulation of the administrative tribunal regulating a particular industry may be so far-reaching and effective as to displace managerial discretion and actually guide actions of the regulated industry. At this point what is considered as private enterprise, for all practical purposes, becomes a nationalized undertaking.[156] It is not advocated here that the airlines of the United States be taken over by the Federal Government. That is an experiment of other countries to be examined objectively.[157] *What is advocated is that the CAB determine, as a policy matter, especially in the light of Sections* 2[158] *and* 406[159] *of the Act, to what extent the airlines should be treated as nationalized industries.*

This is the primary determination which should be made and which will largely control the answer to the remaining policy questions.

2. If airline management is in business either for and or with the Government, *what meaning should be given the phrase "honest, efficient, and economical management" found in Section* 406 *of the Act?*[160]

3. In the light of these determinations, the Board should decide *what is the meaning, purpose and intention of a certificate of public convenience and necessity as a regulatory device in the Civil Aeronautics Act.*[161] Is competition a *sine qua non* in air transport regulation or is regulation so extensive and complete as to guarantee the public protection in the absence of competitive factors?

After having made this analysis, the Board is in a position to construct a revised route pattern. It is suggested that a *route evaluation factor* be formulated which will equate air mail pay to all other airline

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[156] In describing the relationship of the Federal Government to the U.S. railroads through regulation by the ICC, Professor Sharfmann states ". . . any clear cut differential between the sphere of private management and that of public control is largely obliterated. While the method of private ownership and operation is maintained, the Government participates intimately and extensively in fashioning the character and direction of the railroad's activities." 1 SHARFMANN, THE INTERSTATE COMMERCE COMMISSION 284 (1931). It is obvious that these statements apply with even greater force to the Federal Government's regulation of the airlines.

[157] The extent of nationalization of foreign airlines is described in detail in *Hearings before Committees on Interstate and Foreign Commerce on S.* 987 *and Bills Relative to Overseas Air Transportation,* 80th Cong., 1st Sess. (1947).

[158] Declaration of Policy, 52 Stat. 980, 49 USCA §402 (Supp. 1948).

[159] Rates for Transportation of Mail, 52 Stat. 998, 49 USCA §486 (Supp. 1948).

[160] To date the Board has applied and interpreted this phrase only when examining *past* conduct of management. See *Mid-Continent Air, Mail Rate for Route No.* 48, 2 CAB 392, 399 (1940); *Caribbean-Atlantic Air, Mail Rate,* 7 CAB 943 (1947). In the absence of specific Board policy suggestions, the Board's present conduct would seem to place airline management at an unfair disadvantage. The language of §406(b) indicates that the Board is not only to look to the past but also to the *present* and *future* in assisting airline management to attain the standards outlined in §406.

[161] The following quotations are given to indicate the abundance of authority

management-created traffic revenues.[162] In determining this factor, the Board should look at facts and not at unsupported claims of traffic potential. The Board would be afforded its first real opportunity to evaluate such factors as traffic movement and potential, community of interest, and traffic trends of the various routes for what they actually are and not for what air carrier applicants claim they will be.

The route evaluation factor ratio of air mail pay to passenger and cargo revenue would vary with the type of operation involved and would change as engineering developments produced a unit of transportation better adapted to the transportation demands of a particular route. If data either presently available or available after a trial period of operation do not meet the requirement of the route evaluation factor, the operation should be discontinued — the public will have spoken. Exceptions would be created only upon the request of the Post Office Department or the Armed Forces, and subsidization to meet the route factor requirements would be allocated from their funds.

The Board has also failed to recognize that Section 401 (h) of the Act is so worded that suspension of a certificate is a remedial corrective measure rather than punitive, as is revocation.[163]

After having met all "due process" requirements the Board should announce its revised route pattern. Simultaneously, the Board would, in the public interest, convenience and necessity, suspend all route certificates and issue in lieu thereof, three to five year certificates for

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and comment available to the Board for study in connection with the formulation of its answer to this question.

"Air transportation is an industry of decreasing unit cost with increasing size, principally because of high overhead expense and light traffic. Competition within the industry should accordingly be limited to service over alternative routes between large centers. The competition of surface transportation seems adequate to promote efficiency. Commission regulation appears to be prerequisite to the granting of monopolistic certificates of convenience and necessity for particular routes." MOULTON AND ASSOCIATES, THE AMERICAN TRANSPORTATION PROBLEM 759 (1933).

"In carrying out these great objectives of the Civil Aeronautics Act to foster sound economic conditions and to coordinate transportation by air carriers, the prohibition written into the Declaration of Policy against 'unfair or destructive competitive practices' must be observed; and to this end the power vested in the regulatory body to grant or refuse certificates of public convenience and necessity is essential." DRAYTON, TRANSPORTATION UNDER TWO MASTERS 88 (1946).

"It (airline) had to apply for a certificate of public convenience and necessity —a legal device to keep air transportation from developing more rapidly than is convenient for vested interests." From p. X of Introduction, by Thurman Arnold, to WIPRUD, JUSTICE IN TRANSPORTATION, (1945).

"Certificates of convenience and necessity should be granted freely to any enterprise which is able to establish that it can render a service superior to any available or at less cost to the public." WIPRUD, *op. cit. supra* at 171.

[162] See factors evaluated and analyses made in Raymond, *An Adequate Air Transport System for the United States*, PROSPECTS AND PROBLEMS IN AVIATION 49 (1945). It will be recalled that Mr. W. A. M. Burden recommended use of a route valuation formula to the FAC. His plan would have required discontinuance of operation over any route which "needed" air mail pay subsidy in an amount greater than 150 per cent of all other revenue. Note 88, *supra*.

[163] Note, *Suspension of Certificates of Convenience and Necessity under the Civil Aeronautics Act of* 1938, 14 J. Air L. & C. 512 (1947).

the new basic route pattern.[164] Only such route segments contained in suspended certificates which the requirements of public convenience and necessity, as reflected in the route evaluation factor, demanded, would be reinstated.[165]

In addition to utilization of the suspension powers of Section 401 (h), flexibility of route pattern could be maintained by so interpreting Section 406 of the Act as not to warrant air mail payment to an airline management which inefficiently and uneconomically retains a route which is either more properly a part of another system or logically should be discontinued. Rules under Section 401 (i) would control all transfers.

The Board has a real opportunity to correct a recognized deficiency in its method of regulation and to erase past errors caused by an unintegrated route plan. No other administrative body has ever been given such a challenge. It is believed that a sincere effort by the Board to construct and administer such a plan in the public interest would be beyond judicial disapproval.[166]

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[164] Through their continued successful operation under 3 - 7 year feeder and foreign or overseas certificates of convenience and necessity, the air carriers have refuted their argument that a *permanent* certificate is an absolute essential to airline operation. Similarly, a brief study of the recent difficulties encountered by the certificated airlines to refinance their operations readily indicates that a *permanent* certificate does not necessarily attract capital to airline investment.

[165] In this connection it should be recalled that a different route factor would be determined for each type of route and for the operation into which the route is integrated—feeder, local, and trunk, etc. It may very well be that the Board would find that no operation over an existing route should be discontinued through suspension of certificates of convenience and necessity.

[166] *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456 (1924); *Crescent Express Lines v. United States*, 320 U.S. 401 (1943); *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945). Hale, *Hearings: The Right to a Trial, with Special Reference to Administrative Powers*, 42 Ill. L. Rev. 749 (1948).

## APPENDIX A

### Valuations for Transfer Purposes, of Domestic Air Carrier Property, Including Certificates of Public Convenience and Necessity, Approved by the CAB to Date

| Case and Citation | What Purchased | Purchase Price | Valuation of Physical Assets | Valuation of "Intangibles" Including "Certificate" or "Franchise" | Mileage of Routes Transferred | Intangible Valuation Per Route Mile | "Intangibles" as Percentage of Purchase Price |
|---|---|---|---|---|---|---|---|
| *Acquisition of Marquette by T W A, Supplemental Opinion*, 2 CAB 409 (1940) | Stock, goods and all assets, including certificate of convenience and necessity | $ 313,333.33 | $ 30,000.00 | $ 283,333.33 | 557 | $ 508.68 | 90.4 |
| *Western A.L. Acquisition of Inland A.L.*, 4 CAB 654 (1944) | 100% of outstanding shares of common stock | $ 415,471.00 | $ 296,000.00 | $ 119,471.00 | 1,252 | $ 95.42 | 28.8 |
| *Acquisition of Mayflower by Northeast Air, Supplemental Opinion*, 6 CAB 139 (1944) | Certificate of convenience and necessity and small tract of undeveloped land | $ 17,500.00 | $ 8,300.00 | $ 9,200.00 | 129 | $ 71.32 | 52.6 |
| *United - Western, Acquisition of Air Carrier Property*, 8 CAB 298 (1947) | Certificate of convenience and necessity for Route 68, Los Angeles-Denver, and physical properties used in conjunction therewith | $3,750,000.00 | $1,643,791.00 | $2,106,209.00 | 856 | $2,460.52 | 56.2 |
| | | | | | Average | $ 783.99 | 57.0 |

# PROCEDURE IN SAFETY ENFORCEMENT PROCEEDINGS WITH RESPECT TO AIRMAN CERTIFICATES—*THE EVOLUTION OF AN ADMINISTRATIVE PROCEDURE*

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## INTRODUCTION

THE procedure in safety enforcement proceedings,[1] held by the Civil Aeronautics Board pursuant to the provisions of Title VI of the Civil Aeronautics Act of 1938,[2] as amended,[3] has passed through an interesting evolution. In such proceedings, hearings are held for the suspension or revocation of airman certificates of pilots or mechanics who endanger air safety by violating provisions of the Civil Air Regulations. Other certificates may also be involved in such actions.[4] Such proceedings also include hearings held upon appeals to the Board by applicants for airman certificates who are denied certificates by the issuing authority, the Administrator of Civil Aeronautics.[5]

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[1] Safety enforcement proceedings should be distinguished from other proceedings conducted by the Civil Aeronautics Board, such as those for the investigation of accidents, for the promulgation of regulations, and for the determination of various issues arising in the economic regulation of air carriers. Such proceedings are conducted under other procedures which are severally more appropriate.

[2] Sections 601-610 of the Civil Aeronautics Act, June 23, 1938, c.601, 52 Stat. 977, 49 USC 401.

[3] For the purposes of this article, the principal amendment was the enactment of Reorganization Plans III and IV, sec. 7 in each, effective June 30, 1940; 5 F.R. 2109, 2421, 54 Stat. 1233, 1235. Prior to this date, the Board was known as the "Civil Aeronautics Authority" or simply the "Authority." Herein, it will uniformly be called the Board and the Civil Aeronautics Act of 1938, as amended, the Act.

[4] Certificate of parachute technicians, control tower operators or aircraft dispatchers, the production certificates of manufacturers, the operating certificates of air carriers, or the certificates of air agencies such as flight, ground or mechanic schools or repair stations.

[5] Section 602 of the Act, as amended. The Reorganization Plans referred to in the footnote above created separate powers for the Administrator of Civil Aeronautics, hereinafter called the Administrator, and transferred to him the power to issue certificates and thereafter proceed against certificate holders for alleged violations. The Administrator was given exclusive jurisdiction over the levy and

Although evolution of the safety enforcement proceeding under the Board is the topic herein, some passing mention should be made of the procedure for similar enforcement under the Air Commerce Act of 1926. Such procedure was executive in nature rather than judicial, at least by comparison. For instance, under that act the Secretary of Commerce was empowered, prior to hearing, to suspend or revoke an airman license.[6] If the holder requested a hearing, the law provided that a hearing must be granted and a decision rendered promptly, but the Secretary's decision was "final, if in accordance with law."[7] In contrast, the procedure originally adopted by the Board, first called the "Authority," appears cumbersome. In fact, such procedure was later proved unnecessarily formal. The evolution of the Board's procedure will in substantial part show a progress in efficiency achieved by deleting from such procedure those steps and minutiae that were essentially formalistic rather than necessary for the preservation of the rights of certificate holders and the public.

The procedure of the safety enforcement proceeding has principally been developed into its present form in response to the pressure of administrative necessities. The number of airplanes and pilots in civil aviation has increased tremendously since the Civil Aeronautics Act of 1938 became law in June of that year.[8] The number of violation cases also increased greatly[9] but no comparative increase was made in

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compromise of civil penalties, Cf. *Reid, Airman Certificate*, 5 CAB 4, 7 (1940) with *Peters, Airman Certificate*, 5 CAB 346, 350 (1942). However, with this exception, the Administrator exercises regulatory powers over certificates pursuant to regulatory provisions promulgated, and reviewing powers retained by the Board. In appeals from the Administrator's refusal to issue an airman certificate, the applicant may be a petitioner, but he may also be the respondent in the proceeding when the Administrator's refusal amounts, in substance, to a revocation of an existing certificate. In other safety cases brought with respect to certificates, the Administrator is called the Complainant and the certificate holder the Respondent. For a period of time, recently terminated, the terminology was "Plaintiff" and "Defendant."

[6] May 20, 1926, c. 344, 44 Stat. 568; 49 USC 171. It appears that a "license" was understood to comprise both the certificate of competency and the medical certificate of the airman. Mr. Fagg considered the term "license" incorrect, on the ground that the Act referred to certificates, which imply a right to fly, whereas "license" carries an implication that flight is a mere privilege. Fagg, *Legal Basis of the Civil Air Regulations*, 10 J. Air L. & C., 7, 8-9 (1939). Mr. Fagg was a draftsman of the Civil Air Regulations as promulgated under the Secretary of Commerce, and became Director of Air Commerce on March 1, 1937. For comment on the Air Commerce Regulations and the C.A.R. as first drafted under the Secretary of Commerce, see Wigmore, *Form and Scope of the Civil Air Regulations*, 10 J. Air L. & C. 1 (1939), and Knotts, *Cooperative Planning of the Civil Air Regulations, Id.*, 30.

[7] Sec. 3(f) Air Commerce Act of 1926. Upon request of the certificate holder made after notice, the Secretary was required to arrange for a public hearing within 20 days and all evidence at the hearing was to be forwarded for his decision, which was to be made not more than 10 days after the close of the hearing. See also, Legislative History of the Air Commerce Act of 1926, p. 35; Appendix, House Report 1262, H.R. 10522, 68th Cong., 2nd Sess. (Hearings, December, 1924).

[8] In rough figures, the number of certificated aircraft in the United States has increased from 10 to 96½ thousand and certificated pilots from 33 to 500 thousand.

[9] In 1939, there were 131 safety cases of action taken against certificates, in 25 of which hearings were held. In 1947, disposition was made of 550 safety cases, in 194 of which hearings were held. Until 1948, no increase was made in the number of the Board's examiner personnel.

the personnel of the Board engaged in enforcement cases. Other duties of the Board increased greatly.[10] As a practical matter, the Board could not have executed its enforcement duties under the Act if it had retained the procedure originally instituted for hearings and the suspension or revocation of certificates. Such revisions have vastly increased the productivity of CAB personnel working in this phase of regulation.[11] The resulting administrative efficiency has saved money for the government and enabled the Board to restore its dockets to a current basis in safety enforcement.[12]

The report issued in 1939-1941 by the Attorney General's Committee on Administrative Procedure[13] contained several procedural suggestions. It indicated that certain changes that were administratively helpful could be undertaken legally, particularly changes involving the delegation of judicial power to examiners.[14]

### Relation of Procedure to Substance

The procedure in safety enforcement proceedings cases has, of course, a relation to the substantive issues that arise in such cases. Since these cases are civil and remedial in nature,[15] they are not governed by rules applicable only to criminal and penal proceedings. The regu-

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[10] Economic proceedings of the Board increased as air transportation expanded with the addition of new routes, new air carriers and new types of air transportation such as feeder lines, international air carriers and operators engaged in non-scheduled and cargo operations. During the defense and war periods, national adjustments of air transportation were required and internal adjustments within the Board were also made necessary by the entry of personnel into the armed forces.

[11] In terms of cases decided by examiners, the yearly average per examiner has risen from 35 to 140.

[12] Savings are noticeable in the increased rate noted in the footnote above. However, the incrase in cases was too great for the Safety Enforcement Examiners Division to handle without an increase in personnel. In April, 1948, before such increase was effected, a backlog of 707 cases had accumulated (513 non-hearing cases and 194 hearing cases). Such backlog has been substantially reduced subsequent to that date due to the appointment of additional examiners and institution of a system whereby examiners are stationed in regional offices. However, the number of cases for decisions has also increased as experience has demonstrated to investigators and prosecuting authorities (both federal and state) that cases can be brought to disposition promptly. The increase of efficiency tells both in time and in expense but it must be evaluated on an examiner-case basis.

[13] Attorney General's Commission on Administrative Procedure, Monograph No. 19; Senate Doc. No. 10, 77th Cong., 1st Sess., pt. 6, submitted March 1940, revised May 1940; *Id.*, Final Report 1941.

[14] After discussing the long period of time then required to bring a safety enforcement case to decision, the report asked, in a rhetorical question suggesting a negative answer, "Is there any reason in law or policy which militates against the Board's delegating the power to subordinates to act, not as trial examiners, but as trial judges, authorized to make orders which will be deemed binding unless the Board is petitioned to reconsider the case?"

[15] See *Charles Robert Sisto*, Docket No. SR-1987, decided October 26, 1948, where the Board in its order prohibited the Respondent from carrying passengers for hire, saying in the decision:

> "Any action taken here will be remedial and not punitive, a measure for the public safety."

Analysis of the facts, including proof that the Respondent, as the pilot in command of a DC-4, for no good reason imperiled the lives of 49 passengers and 5 crew members, requires the conclusion that the Board refrained from punitive action for the reason that such action would not be consistent with the purpose

latory powers of the Board with respect to air safety are interpreted by the Act's broad definition of "air commerce," which was cited by the Supreme Court as an example of congressional action intended to reach to the full extent of its constitutional power.[16] The Civil Air Regulations are thus applicable to all flying, whether interstate or intrastate. However, states and municipalities have some concurrent jurisdiction over violations of their respective laws and ordinances, and as a matter of policy, the Administrator has relied heavily upon their cooperation in reporting violations of the federal regulations and furnishing evidence.[17]

Pilot's certificates are usually suspended or revoked for violations of Civil Air Regulations involving peril or injury to the persons or property of others. The Act and the Civil Air Regulations promulgated under it have been intended to impose as little restriction as safety will permit upon private, noncommercial, flying.[18] However, one objective of the Board under the Act is "The regulation of air commerce in such manner as to best promote its development and safety,"[19] and Section 609 of the Act permits the suspension of airman and other certificates "if the interest of the public so requires." The Board has suspended the certificates of some pilots because they have undertaken

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of a safety enforcement proceeding. The order was designed to protect commercial passengers from the "irresponsible character" revealed by the conduct of the airline pilot. In *Angel, Airman Certificate,* 5 CAB 10, 11-12 (1940) the Board held that its suspension and revocation proceedings are civil in nature, and that for this reason proof beyond a reasonable doubt is not required. Of course, civil and remedial orders may have some punitive effect, but this is unavoidable.

[16] *Polish Nat. Alliance* (etc.) *v. N.L.R.B.*, 322 U.S. 643, 647, 64 S. Ct. 1196, 88 L.Fed. 1509 (1944) with reference to section 1(3) of the Act (52 Stat. 973, 977, 49 USC 401 (3).

> "Section 1(3) 'Air Commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft which directly affects, or *may endanger* safety in, interstate, overseas, or foreign air commerce." (Emphasis supplied.)

See also and compare, *Neiswonger v. Goodyear T. & R. Co.*, 35 F. 2d 761 (D. Ct., N.D.O., 1929, decided under the Air Commerce Act; annotated, 1 J. Air L. 359 (1930).

[17] See Hearings, S. 3659, 75th Cong., 3rd Sess., p. 99, where registration provisions were advocated for regulation of "all flying, of an intrastate character and of a noncommercial character." For articles of interest and authorities with respect to federal and state jurisdiction and cooperation, see text and citations in Elwell, *Enforcement of Air Safety Regulations,* 14 J. Air L. & C., 318 (1947); Report of the Standing Committee on Aeronautical Law, American Bar Association, 10 J. Air L. & C., 505 (1939); Tipton, *Legislative Program for Aviation,* 11 Law & Cont. Prob. 564, 567 (1946); *The Enforcement of Safety Regulations by the Civil Aeronautics Authority,* 35 Calif. L.R. 280 (1947); and Black, *Uniformity in Air Safety Regulation: Cooperative Federalism Applied,* 15 J. Air L. & C. 181 (1948).

[18] The Federal Aviation Commission in its Recommendation No. 31, Senate Doc. No. 15, 74th Cong., 1st Sess., Jan. 30, 1935, recommended that there be a minimum of regulation upon private flying, and that for safety alone. Sec. 601(b) of the Act requires the Board to give "full consideration" to differences between air transportation and other air commerce, (*i.e.*, to differences between air carrier operations, and other aircraft operations, principally private flying), and states that the Board "shall not deem itself required to give preference" to either "in the administration and enforcement of this title."

[19] Section 2(e) of the Act.

to obstruct enforcement of the Act and the Civil Air Regulations.[20] Such obstruction affects air safety.

A review of the scope of the Civil Air Regulations would extend beyond the reasonable confines of this subject. It may briefly be stated that pilot certificates are most frequently suspended or revoked as a result of a pilot's low flying, with or without diving at houses, vehicles, vessels, persons, or for his flying in weather that is under minimums established for visual ("contact") flight rules.

### Limitation of Actions

The Act contains no period for limitation of actions available as a defense. Section 609 imposes a limitation period of 30 days applicable to the emergency suspension of certificates by the Administrator, which period may be extended pending hearing to 60 days, but there is no statutory limitation relating to the time of instituting proceedings. The effect of administrative delay or laches has been considered in safety proceedings before the Board. From 1942 to 1946 section 92.19 of the Civil Air Regulations required that a complaint be filed within six months of the occurrence of the offense on which it was based. This regulation was abrogated after the case of *John Clarence Hayes, Jr.*[21] However, many proceedings have since been terminated, or the period of suspension reduced, because of unwarranted delay by the Administrator or the Board.[22]

Under the present practice of the Board, prejudice to the Respondent by reason of the delay and the unavailability of witnesses or other considerations bearing upon the fairness and adequacy of a delayed hearing are weighed in each case. The policy of the Board is to insure prompt determinations in safety enforcement cases.

### Commencing the Proceeding

Under present practice, a proceeding is commenced when the Board serves upon a certificate holder, as Respondent, a complaint filed by the Administrator of Civil Aeronautics, as Complainant. Service

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[20] Illustrative cases of certificate suspension are those of *Herbert M. Peters*, SR-559 (1943) where Respondent assaulted a CAA inspector who was engaged in the performance of assigned duties; *James Owen Brooks*, SR-929 (1945) where Respondent aided and abetted a student pilot in the latter's assault on a mechanic for reporting a violation; *Jack Kenneth Brown*, SR-4-79 (1948) where Respondent surreptitiously removed one of the papers used in giving an official examination for commercial pilot rating.

[21] Docket No. SR-1547 (May 24, 1946). In this case the Administrator pointed out, upon appeal, among other arguments, that a fixed rule of limitation might prejudice the public interest in air safety in individual cases involving extreme violations. Prior to its abrogation by Amendment 97-4, June 11, 1946 (11 F.R. 6583), sec. 97.19 had been renumbered sec. 97.20. Section 97 of the CAR contains the Board's Rules of Practice applicable in safety enforcement cases.

[22] See and compare *Cyrus Rodney Nicholson*, SR-847 (1946); *Victor R. Evans*, SR-1363 (1947); *Robert Elmer Bailey*, SR-1547 (1947); *George A. Van De Sande*, SR-3-138 (1948).

is by registered mail in accordance with the provisions of the Act[23] and the Board's Rules of Practice.[24] The Board's Rules of Practice further provide that any allegations of the complaint that are not answered shall be deemed admitted. The period of 10 days that is allowed for answer is short, because in the great majority of cases issues are factual, requiring only a single statement without necessity for careful draftsmanship or legal research. However, as a matter of practice, when reasonable extensions of time to answer are requested, they are liberally granted.

Under the original practice of the Board, proceedings for the suspension or revocation of certificates were instituted upon an order to show cause issued by the Board. Such proceedings were cumbersome and more formal than was appropriate to the nature of the proceeding. During this period, the Board, included within its organization the Administrator of Civil Aeronautics and his staff. Prosecution was conducted by attorneys from the Safety Enforcement section of the Operations Division of the General Counsel's Office, who decided the cases in which an order to show cause should issue and presented the case against the certificate holder at the hearing. Since attorneys from the same section were sometimes assigned as examiners at hearings, and upon the filing of exceptions to an examiner's report might thereafter recommend action by the Board on such exceptions, the Attorney General's Commission on Administrative Procedure commented adversely on the procedure.[25]

The Board was not required to remedy the situation of combined prosecuting and judicial functions because Congress removed the need by the enactment of Reorganization Plans III and IV, effective June 30, 1940.[26] Subsequent to the effective date of the Reorganization Plans, the Administrator has in almost all cases made the decision to proceed against certificate holders, while the examiners of the Board have acted in a judicial capacity only. However, the Board has retained concurrent power to bring proceedings for the suspension or revocation of certificates. When the Administrator does not act in a case where the General Counsel's Office of the Board deems such a proceeding necessary, the Board institutes the proceeding, still by order to show cause. Cases are now heard by examiners in the Safety Enforcement Proceedings Division of the Board's Bureau of Hearing Examiners, which division no longer has any ties to the General Counsel's Office.

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[23] Sec. 1005(c).

[24] Sec. 97.13, CAR.

[25] Monograph No. 19, pp. 120-131; Senate Doc. No. 10, 77th Cong., 1st Sess., Pt. 6, pp. 52-57. Although the Committee was critical of the organizational handling of the cases, it made clear that the practice of combining examiner-attorney functions had not been prejudicial to certificate holders.

[26] See footnotes 3 and 5 *supra*.

### Formulation of Issues

The issues in safety enforcement proceedings are normally defined by the complaint and answer without further procedure. A Respondent may file a motion to make the complaint more definite and certain if he desires further information.[27] Usually, proceedings go to hearing upon a denial of the allegations of the complaint or a defense of extenuating circumstances alleged in the answer.

Pre-hearing conference procedure is used in these proceedings although it is obviously not as valuable as in economic proceedings where there are often numerous parties, and it is often difficult to formulate issues clearly, and wherein a large amount of evidence of a documentary nature is introduced by stipulation and reference, in part at the request of Public Counsel. In safety enforcement proceedings, there are usually some facts which may be stipulated. Short conferences held immediately prior to the opening of proceedings enable the parties to come to an agreement as to what facts are in issue, serving to shorten and clarify the hearing itself.[28] On some occasions, it has even been found that such conferences remove the necessity of any contest whatsoever.[29] The parties then know what they can or can not prove and sometimes find, after such a conference, that they are in agreement with respect to the terms of the order that is determined appropriate by the examiner. In such cases, of course, the time and expense of the hearing and subsequent procedure are considerably lessened.

Amendments are freely granted when they will not operate to the prejudice of Respondents.[30] From the legal point of view, amendments are more generously permissible in a civil and remedial proceeding than they would be if the proceeding were criminal in nature. From the practical point of view, it appears that Respondents are usually not interested in unnecessary continuances or in otherwise delaying the proceedings (or decisions and orders therein), as defendants often are in other types of cases. Respondents in safety enforcement cases are usually interested in getting a decision promptly and, if they perceive that a period of suspension or revocation must run against them, they are usually interested in having it start and determined as quickly as possible.

### Non-Hearing Procedure

Under the procedure of the Board, decisions are issued by examiners after hearings and also after the examination of records of evidence submitted under nonhearing procedure. The evolution of safety enforcement procedure was furthered by the Board's instituting nonhearing procedure.

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[27] Sec. 97.15 CAR.
[28] Sec. 97.29(g) CAR.
[29] Sec. 5(b) Administrative Procedure Act.
[30] In *Lyle Pedelty*, SR-5-177 (1948) an amendment to conform to the proof was denied when such amendment appeared prejudicial to Respondent.

The institution of nonhearing procedure, which obtains when a certificate holder has waived his right to hearing, has saved an immense amount of time and administrative detail in the enforcement of safety regulations and standards. The Board found by experience that a large proportion of respondents were not interested in contesting complaints brought against them by the Administrator, if a means was provided whereby the respondent might place his view of the case and personal considerations relating to the terms of suspension before the Board.[31] Such procedure is also appropriate, of course, when there is no meritorious defense or mitigating circumstances (or personal situation of the Respondent) that requires consideration in the formulation of the findings or order. Such procedure might more appropriately be called "waiver" or "informal hearing" procedure, but the terminology "nonhearing" has been established by usage.

Under nonhearing procedure Respondent files an answer or a statement, which may be supported by statements of other individuals having information with respect to the violations in issue or factors bearing upon the order that would be appropriate upon proof of the violation. The Administrator submits evidence, which usually includes the statements of persons who have complained to Civil Aeronautics officials about the Respondent's conduct, and recommends a suspension or revocation of the Respondent's airman certificate. Upon such a record, the examiner issues an initial decision including findings and an order. The examiner may request further information from the parties when he deems that additional evidence is necessary for a determination of the issues in the public interest. Such procedure is obviously inappropriate for the determination of contested issues of fact involving substantial conflicts of evidence. However, in such cases of factual conflict hearings are seldom waived.

There is some question whether an examiner possesses the power to order a hearing, notwithstanding waiver, although the Board has exercised such power when it found a hearing was necessary to protect the public interest in air safety.[32] By court decision, it has been decided, in a case where evidence was sufficient, that the Board may decide the case upon the evidence submitted, even though other evidence that was also available was not submitted. In *Cameron v. Civil Aeronautics*

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[31] Sec. 97.22 CAR.

[32] Section 97.29 of Civil Aeronautics Regulations, Rules of Practice Governing Safety Cases, does not specifically include such power, but it may be delegated therein by implication. It delegates the authority, upon an assigned case, to hold and regulate the course of hearings and to make an initial decision. The question bears some fundamental analogy to that of the power and duty of an examiner to call and, if necessary, examine and cross-examine necessary witnesses who are present at a hearing but not called by a party. Such participation by examiners in hearings is discussed in the text hereinafter. As a practical matter, parties will usually consent to a formal hearing when an examiner indicates that he thinks one is necessary for the protection of the public interest in air safety.

*Board*[33] the Board's nonhearing procedure was tested by the Respondent upon appeal to the Circuit Court of Appeals. Therein, Respondent contended that the Board should have obtained further evidence upon an ultimate fact whether or not the pilot had obeyed control tower instructions during a landing approach. It appears that in accordance with usual tower procedure a recording had been made by dictaphone record preserving the conversation of the control tower and pilot, but that this had not been submitted nor played as evidence to be considered in determination of the issues. The Board rendered its decision against Respondent on the evidence submitted, which was otherwise sufficient. The court affirmed the Board's decision in view of Respondent's waiver of hearing, and the Supreme Court denied certiorari.[34]

The *Cameron* case affirms the Board's power therein exercised but appears to concede by implication that the Board could have required the submission of further evidence. It appears that the facts of any particular case and the exercise of expert judgment with respect to the requirements for air safety should guide the Board in its making of requests for further evidence and, by extension of the same principle, in requiring hearings notwithstanding waiver thereof. The Board is not neutral in its functions, although it is impartial among litigants. The Board is primarily judicial in safety enforcement cases, but it also functions under a command by Congress to foster and protect air safety. The protection of air safety and due recognition of the rights of certificate holders require an adequate record in enforcement cases.

## Hearings

In the cases where a hearing is held, hearing procedure is similar to that of other administrative hearings. Procedure is informal in comparison to the procedure in court actions but it generally follows that used in judicial proceedings. Decisions are issued on the basis of the reliable, probative and substantial evidence that has been received.

The examiner is sometimes required to participate actively in hearings. It may appear appropriate to make unrequested rulings in order to preserve the rights of Respondents who are not represented by an attorney. An examiner must also participate in the examination or cross-examination of witnesses because of his duty to develop fully evidence necessary to obtain an adequate record.[35] As a practical matter, such questioning can occur with unpredictable witnesses when the attorneys for the parties are reluctant to ask crucial questions to which an adverse answer might prejudice their cases. Examiners have no responsibility for the prosecution of violations, as distinguished from the conduct of hearings, and the nature of the cases heard makes any

[33] 140 F. 2d 482, 485 (CCA 7, 1944). Other issues than that discussed herein were decided. Among these, it was determined that a military pilot who is flying on duty must conform to the Civil Air Regulations unless his orders require a violation.

[34] 323 U.S. 716.

[35] Sec. 97.29(d) CAR delegates to examiners the power to examine witnesses.

personal interest of an examiner in a case unlikely. The authors do not know of any case where a well-founded objection to any Board examiner has been made on the grounds of his alleged bias or prejudice.[36]

### Decision and Order

Under present procedure authorized by the Administrative Procedure Act, examiners issue initial decisions which, if no appeal is taken in a stated time, become effective as decisions of the Board.[37] Appeals to the Board in such decisions are relatively infrequent.[38] This procedure is followed in both hearing and nonhearing cases, and in hearing cases with respect to both written and oral decisions. It saves an immense amount of time and detailed work in contrast to the former procedure, wherein the Board wrote a full opinion in every safety proceeding case.[39]

Both the present and the past procedure of the Board may, of course, be contrasted further with that which obtained under the Air Commerce Act of 1926, where the Secretary of Commerce suspended or revoked certificates and then permitted an appeal to the Secretary from such order of suspension or revocation. Under present procedure, full consideration is given to a certificate holder's contentions and evidence before any action is taken against his certificate, but time and expense are not wasted in unnecessary formal procedures.

The procedure described was approximated in Board practice prior to the effective date of the Administrative Procedure Act. In appropriate cases, examiners indicated their decisions orally at the close of hearings, and when both parties were satisfied, and waived their rights to appeal from the indicated order, an order to become effective immediately was entered upon the record. In confirmation, written copies of the order were issued formally by the Board at a later date after the reporters' submission of the record transcript. Such procedure accommodated the parties and saved substantial expense to the govern-

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[36] The issue was raised in *D. W. Rentzel v. Charles Robert Sisto*, SR-1987, October 26, 1948, which case is now on appeal to the Court of Appeals for the District of Columbia. The rules of practice provide for disqualification of an examiner on his own motion or by the Board for reasons of his bias or prejudice. Sec. 97.29(m) (2 and 3) CAR.

[37] Sec. 97.22 and 97.23 CAR.

[38] In the early period of safety enforcement appeals were taken in approximately 20 percent of the cases, and in the period now terminating in approximately 10 percent. However, this latter percentage includes hearing waived cases and all objections and exceptions raised. Among such appeals are requests by Respondents which are not legal exceptions but prayers for greater leniency; there are also objections based upon facts which occurred after submission or, having occurred earlier, had not been placed before the examiner when he issued his decision. Under court terminology and procedure, many of such petitions and requests would not qualify as appeals.

[39] Compare the cases of *Clarence A. Conroy*, SR-66, Oct. 24, 1941 with *James F. Holmes*, SR-82, Oct. 28, 1941. 5 CAB Reports 180, with *Charles Glen Pierce*, SR-5-36, March 29, 1948 and *John Joseph Pfaffinger*, SR-1931, Feb. 11, 1948. Separation of findings of fact from conclusions of law in decisions was also discontinued at an early date. See *Thomas Guy Brown*, SR-914 (1944). With respect to the passage of time in issuance of decisions, see footnote 41 hereinafter.

ment. Legally, such procedure constituted an approximation of the consent decree.[40]

Considerable time is saved in the issuance of a decision when it is issued orally by an examiner at the hearing. Examiners normally hear cases in groups that are docketed for hearing at places near the residences of Respondents in a series of hearings convenient for traveling from one place to another. To issue a written decision, an examiner must complete a series of hearings, return to his headquarters, wait for the submission of the transcripts by the reporter (in most cases), and thereafter study the transcripts and prepare the decision. Such delay may total 14 to 60 days with no lack of diligence whatsoever on the part of the examiner.[41] At the close of such period, a pilot whose certificate was suspended for a short period might, in the case of an immediately effective decision, be flying again.

As a matter of law, a Respondent is entitled to exercise the privileges of his airman certificate until such date as it is actually suspended or revoked by an order that has become effective as an order of the Board.[42] However, in practice, airport operators and officials regulating instruction in aeronautics under the GI Bill of Rights are often reluctant to permit persons charged with violations from flying until the Board has taken action. Respondents, with very few exceptions, prefer to have orders issued and effective as soon as possible. The Administrator's attorneys are generaly pleased to have their cases reach disposition. Therefore, when it is possible for an examiner to issue a decision orally, the parties usually appreciate such action.

An oral decision may not be issued if either party requests a written decision, and in some cases an examiner feels that it is necessary to study the transcript of the record or to conduct research into authorities before entering findings or an order. When parties do not waive their rights to appeal, oral decisions are like written decisions in that, in the absence of appeal, they become effective as orders of the Board within a stipulated time, 10 days or a longer period if requested.

Under the Administrative Procedure Act, parties are entitled to submit findings of fact and conclusions of law.[43] As a matter of practice, this right is not usually claimed. Oral argument to the examiner is also permissible and the filing of briefs, but in practice either is rare.[44] The parties or their attorneys do frequently make statements, however, to clarify their positions and summarize the evidence in support of their cases. Such statements are often the informal equivalent of oral argument before the examiner.

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[40] See section 5(b) Administrative Procedure Act; *Id.*, Legislative History, p. 24.

[41] The time consumed in such normal processing should be considered in connection with the further time necessary for issuance when each case was studied by individual Board Members, placed upon the Board's agenda, and an opinion acceptable to each member drafted.

[42] In practice, the Administrator does not suspend certificates at once in exercise of his emergency powers, except in extreme cases.

[43] Section 8(b) Administrative Procedure Act; sec. 97.30 CAR.

[44] Sec. 97.30 CAR.

An examiner's authority with respect to a proceeding does not terminate until the time for appeal to the Board has expired.[45] He may thus reconsider findings or conclusions within this period and revise an initial decision if good cause appears. The exercise of such power is available for changes of substance, but is most appropriate for the correction of clerical errors or oversights. In practice, examiners very rarely exercise such authority for any purpose.

### Appeal to the Board

Under present practice, appeals may be taken to the Board from initial decisions issued by examiners.[46] Such decisions customarily allow a short time for the taking of appeals, for the principal reason that most Respondents do not appeal and are interested in having the order become effective at as early a date as is possible. However, if attorneys or Respondent desire extensions of time to prepare an appeal, such extensions are granted as a matter of course. The taking of an appeal suspends, for the duration of the appeal, the effectiveness of an initial decision. Under the former practice of the Board, the equivalent of an appeal was taken by the filing of exceptions to the recommended decision set forth in the report of the examiner.

The Board rarely grants oral argument upon appeals in safety enforcement proceedings. This practice obtains because appeals rarely raise issues that merit oral argument. Parties may submit briefs to the Board, and these are carefully considered. The issues on appeals are reviewed, together with the records of the case and appeals prepared for submission to the Board by the Assistant Chief Trial Examiner in charge of the Safety Enforcement Division and by a review attorney. By this procedure, examiners of the Board are not forced to review the work and the decisions of one another.[47]

Examiners are not advised of the application of Board policy to particular cases prior to decision, but are guided by the precedents of the Board established in decided cases. In the spirit of the Administrative Procedure Act, such procedure avoids any questionable pressure from the agency and approximates the way in which lower courts are guided by decisions of superior courts in appellate cases. The examiner who has issued an appealed decision does not appear before the Board during the course of the review of his decision.[48]

The Board also reviews cases upon the filing of a motion for review filed within 15 days after an initial decision has become effective.[49]

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[45] Sec. 97.29(m)(1) CAR.

[46] Sec. 97.22 and 97.23 CAR.

[47] The Attorney General's Committee commented adversely on such mutual reviewing. See citation footnote 13 above.

[48] Under former practice, examiners were sometimes present before the Board during its decision conferences. An appellant alleged such an instance as error in *O'Carroll v. CAB*, 114 F. 2d 993 (Apps. D.C., 1944). However, the record on appeal disclosed that the examiner had made no comments of materiality, and the court overruled the appellant's objection.

[49] Sec. 97.27 CAR.

Such motion will not stay the effectiveness of the decision in issue. The Board may also review decisions without appeal or motion of a party but upon its own motion. For such review the Board may stay the effect of the order or leave it in effect.

### Possible Changes in Procedures

Both the President's Air Policy Commission and the Congressional Aviation Policy Board have recommended that the safety enforcement activities of the Board and the Administrator be coordinated into unitary control.[50] At present, there is some confusion in such activities that arises from the separation of powers with respect to promulgation of the regulations and enforcement. Lack of unitary powers is a further problem with respect to civil penalties over which the Administrator has sole control, and with respect to reprimands and proceedings for the suspension or revocation of certificates which involve responsibilities of both the Board and the Administrator. In the event that enforcement is again coordinated under a single agency, there would be no reason to anticipate any prejudice arising to certificate holders by reason of the fact that the prosecutor and judge work for the same agency. Examiners are segregated from attorneys and remote from prosecution activities by virtue of the provisions of the Administrative Procedure Act. It is not anticipated that a coordination of activities would materially change procedure of safety enforcement proceedings, as above described. However, some broadening of procedure might be necessary if the proceedings were to include issues relating to civil penalty as well as issues pertaining to the suspension and revocation of certificates.

### Conclusion

In the above discussion, only passing reference has been made to the various provisions of the Administrative Procedure Act. Those who are familiar with that act will note that the various changes of procedure that have been commented upon above are in the spirit of, and consistent with the provisions of that act. From a governmental and administrative point of view, it is principally interesting to note that most changes were made prior to the effective date of that act, and that several important changes were made primarily to effect greater administrative efficiency in the issuance of decisions for the enforcement of air safety. Such administrative experience tends to confirm the practicality of the Administrative Procedure Act, and of course also endorses the changes that have been made by the Board, making them appear forward looking and well-formulated in the interests of proper judicial procedure.

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[50] SURVIVAL IN THE AIR AGE, pp. 137, 139 (1948); Senate Report No. 949, 80th Cong., 2nd Sess., Rec. No. 84, pp. 50-51, Rec. 89, p. 52 (1948). See also Final Report of the Attorney General's Committee on Administrative Procedure, p. 175 (1941).

# EVALUATION OF PROPOSALS TO INCREASE THE "WARSAW CONVENTION" LIMIT OF PASSENGER LIABILITY

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A LIVELY debate was set off at Cairo in 1946 when one of the British representatives on the CITEJA officially proposed that article 22 of the "Warsaw Convention"[1] be amended so as to double the limit of passenger liability. This would mean raising the limit to 250,000 French gold (Poincare) France as defined in the convention. Major K. M. Beaumont, in his article in the Law Journal[2] of November 28, 1947, has advocated increasing the limit to 375,000 Poincare Francs. Christopher Shawcross, in his article in the March 1948 issue of Air Transport and Airport Engineering[3] has gone so far as to suggest a limit of £8,000 or about four times the present limit.

Translated into U.S. Currency, this would mean increasing the present limit from $8,292 to $16,584, as proposed by Brigadier Wilberforce at Cairo, in 1946; to $24,876, as proposed by Major Beaumont in 1947; and to $33,252 as proposed by Mr. Shawcross early in 1948. While the debate continues, powerful basic economic forces continuously, effectively and automatically are correcting the Warsaw Convention limit of passenger liability for changes in the gold value of the national currencies of the various adherent nations. This is a tribute to the farsightedness and excellent judgment of the original framers of this convention.

When viewed against the background of post war inflation, it may, at first glance, seem highly appropriate to some, to bring up for amendment and revision this nineteen-year-old document. To some, in view of the steady upward trend of commodity prices throughout the world, the revision of this treaty may appear urgently necessary, particularly with respect to those of its provisions which limit the liability of the air

[1] U.S. Treaty Ser. No. 876; 49 U.S. Stat. at L. 3000; 1934 USAvR 245.

[2] Beaumont, K. M., *Liability of International Air Carriers*, The Law Journal (London, England), November 28, 1947.

[3] Shawcross, C., *The Warsaw Convention and Air Commerce*, 3 Air Transport and Airport Engineering, (London, England) 54-55 (Feb. 1948); 80-82 (March 1948).

carrier arising out of bodily injury to or death of a passenger. As evidence of the need to change the limits of passenger liability, some proponents of revision cite the increasing size of awards for tortious bodily injury or death which currently are being made in the Courts of both England and the United States of America.

It is the purpose of this study to examine certain economic facts and to discover whether or not they support the theories advanced by those who favor upward revision of the Warsaw Convention limit of passenger liability.

Every student of this treaty recognizes the fact that the limit of passenger liability agreed upon in 1929 was a compromise. Even in 1929 the limit of 125,000 French gold francs[4] probably was rather low for the United States since at that time it was equivalent to only $4,898. The same probably could have been said for Great Britain since in 1929 the limit was equivalent to only £1006. Both of these countries then enjoyed, and still do enjoy, a relatively high standard of living. Consequently, in these two countries, it is only natural that a comparatively high value is placed upon a human life. From a moral point of view, there is not sufficient money in the world to pay for the loss of a human life. However, as a practical matter, it is both necessary and customary to estimate the economic or money value of the damage suffered by dependents as a result of the death, or the permanent disability or other injury of the breadwinner, by taking into consideration, among other things, the deceased or injured person's station in life; his family responsibilities; his earning power; and his life expectancy.

In any discussion of the adequacy of the limit of passenger liability it must be borne in mind that the Warsaw Convention creates a presumption of liability[5] on the part of the air carrier so that a plaintiff may recover damages without the necessity of proving affirmatively that the air carrier was negligent. In order to escape liability, on the other hand, the air carrier must prove that he took "all necessary measures" to avoid the damage or that it was impossible for him to take such measures.[6] This was done to protect the public, since plaintiffs so often found it impossible to prove negligence because of lack of evidence or very difficult to prove the law of the place of the accident. It is therefore only just, in view of the creation of this presumption of liability, that the air carrier has been given the benefit of a reasonable limit of liability.

The manner in which the public is protected by the presumption of liability embodied in the Warsaw Convention is well illustrated by the decision of Mr. Justice Schreiber in the case of *Wyman and Bartlett v. Pan American Airways, Inc.* in which he said, in part, that there was: "no proof in this case of 'wilful misconduct' on the part of the defend-

[4] Article 22(1).
[5] Article 17.
[6] Article 20(1)

ant," and that there was: "indeed no proof of any negligence connected with or a proximate cause of the accident." He then went on to say that: "The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention *which here operate to permit a recovery that otherwise might be impossible for want of proof.*"[7] On these considerations at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of $8,300 in accordance with the rules stated.

The limit of passenger liability agreed upon in 1929 was intended to be high enough to provide reasonable satisfaction for claimants in the United States and Great Britain, considering the 1929 level of prices and cost of living in those countries, and yet not so high as to discourage other nations from adhering to the convention. Some thirty nations, their territories and possessions have adhered to it.[8] The widespread acceptance of the Warsaw Convention is another great tribute to the good judgment of the framers of that document. Yet the Convention has not been universally accepted, and it is believed that most of the non-adherent countries are non-adherents primarily because the limit of passenger liability was in 1929, and in 1949 still is, too high in relation to the respective standards of living in those countries.

In Brazil, the Brazilian Air Code[9] has set a limit of passenger liability of 100,000 Cruzeiros (approximately $5,440 U.S. currency) for passengers injured or killed in domestic (intra-Brazil) and non-Warsaw international air transportation. Brazil also is an adherent to the Warsaw Convention and thereby accepts the present passenger liability limit of 152,426 Cruzeiros ($8,292 U.S. Currency) as respects injury to or death of passengers in the course of air transportation which meets the Warsaw Convention definition of international air transportation. If Brazil should accept an increase of the Warsaw Convention limit of liability to 304,852 Cruzeiros, ($16,584 U.S. Currency) or to 457,278 Cruzeiros ($24,876 U.S. Currency) for passengers injured or killed in international air transportation while its liability limit, as defined in the Air Code, is only 100,000 Cruzeiros ($5,440 U.S. Currency) with respect to passengers injured or killed in domestic air transportation, the government could, and probably would, be accused of unfair discrimination in favor of international passengers and against domestic passengers.

The regulations issued by the Mexican Ministry of Communications to give effect to the Mexican General Communication Law of 1940[10] state that if an air carrier provides passenger accident insurance

[7] 181 Misc. 963; *aff'd*, 267 App. Div. 947; *aff'd*, 293 N.Y. 878; *Cert. den.*, 324 U.S. 882.

[8] See 1948 USAvR, June 1948, page i.

[9] Brazilian Air Code, Decree-Law No. 483 of June 8, 1938; published in Diario Official June 27, 1938.

[10] Ley de Vias Generales de Comunicacion, approved December 30, 1939; published in Diario Official February 19, 1940.

in the amount of 5,000 pesos (about $724 U.S. Currency) for each passenger, the air carrier shall have no further liability in the event of injury to or death of a passenger. Mexico also is an adherent to the Warsaw Convention of 1929 and thereby accepts the present limit of passenger liability which is equivalent to about 57,226 Pesos ($8,292 U.S. Currency) as respects international air transportation. Prior to July 26, 1948 the limit in terms of Mexican Currency was 40,305 Pesos. If Mexico were to accept a limit of liability of 114,452 Pesos or 171,678 Pesos or 228,904 Pesos for passengers injured or killed in international air transportation it would have great difficulty in justifying to its own people the present limit of liability of only 5,000 Pesos for passengers injured or killed in domestic air transportation.

With the exception of Brazil and Mexico, there are no other adherents to the Warsaw Convention south of the U.S. border in the Americas aside from certain British, French and Netherlands possessions. It is believed that the present limit of passenger liability set by the Convention has discouraged adherences since it is already too high for many countries.

Although the United Kingdom is an adherent to the Warsaw Convention and thereby accepts the passenger liability limit of £2057 ($8,292 U.S. Currency) as respects passengers injured or killed in international air transportation,[11] it is highly interesting to note that in domestic air transportation the rules of liability of the Warsaw Convention are not applied. On the contrary, the air carrier is permitted to contract out of any and all liability for injury or death of a passenger *even though the injury or death be caused by the negligence of the air carrier.*[12] This is an obvious discrimination in favor of international passengers and against domestic passengers. The Warsaw Convention does not permit an air carrier to contract out of its liability.[13]

Thus it is believed that the British Government would find it extremely difficult to convince the people of Britain that the Warsaw Convention limit of passenger liability should be quadrupled as has been suggested by Mr. Shawcross.

France, which also is an adherent to the Warsaw Convention of 1929, accepts the present limit of passenger liability of 125,000 gold (Poincare) Francs consisting of 65½ milligrams of gold 9/10 fine.[14] At the end of 1947 this was equivalent to 987,143 current or paper francs, which in turn was equivalent to $8,292 U.S. Currency. However,

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[11] British Carriage by Air Act, 1932; 22 and 23 Geo. v. Ch. 36; 1933 USAvR 299. This law will NOT apply to domestic air transportaton until an appropriate Order In Council is issued. Up to January 15, 1949 this has not been done.

[12] *McKay and Craigie v. Scottish Airways, Ltd.* Scottish Court of First Instance, 1948 USAvR 79. Also see *Luditt v. Ginger Coote Airways, Ltd.* 1947 USAvR 1.

[13] Article 23.

[14] Article 22(4).

on January 26, 1948, France fixed a new "official" exchange rate. By this act of the French Government the Warsaw Convention limit of passenger liability, expressed in terms of current Francs, automatically was increased to 1,775,209 current Francs on the basis of November 1948 exchange rates. Although this latter figure represents an increase of about 80% in terms of current or paper Francs, the limit still remains unchanged at $8,292 in terms of U.S. Currency.

Can it reasonably be expected that France would approve a passenger liability limit of 3,550,418 Francs or 5,325,627 Francs or 7,100,836 Francs?

The recent increase of 42% in the limit of liability in terms of Mexican Pesos and the increase of 80% in the limit in terms of French Francs, which have been cited above, came about because of the fact that the limit of liability now contained in the Warsaw Convention is stated in terms of a commodity, namely, gold.

The automatic way in which the Warsaw Convention limit of passenger liability, expressed in current monetary units, is corrected for changes in the value of money can more easily be understood if the limit of liability is considered as being the value of 236.9 troy ounces of fine gold. In this connection it should be pointed out that in 1929, when the official U.S.A. gold price was $20.67 per fine ounce, the Warsaw Convention limit of passenger liability was $4,898 U.S. Currency. When the price of gold in the U.S.A. was raised to $35.00 per fine ounce in 1934, the Warsaw Convention limit of passenger liability automatically was increased to $8,292, U.S. Currency. Table I shows the increases which automatically have occurred in terms of various other currencies since 1929.

It would be a serious mistake to define the limits of liability in terms of anything other than some unit of gold currency of a specified weight and fineness. If the present limit had been stated in 1929 as 125,000 current or paper Francs, the dollar equivalent today would be only $584 U.S. Currency at the current official rate of exchange. One could not ask for a better illustration of the great protection given to the public by defining the limit of passenger liability in terms of a gold currency unit.

In 1929, when the present limit of passenger liability was set, the various national currencies had only recently been established on a gold basis and were freely convertible. It would be futile to attempt to set a new limit of passenger liability until the various national currencies have once again been stabilized and are freely convertible. Otherwise there could be no assurance that a new liability limit might not be required within another two or three years.

In view of the fact that some non-adherent countries still consider the present limit of passenger liability to be too high, it does not seem

reasonable to expect to obtain new adherents to the Warsaw Convention if the limit of passenger liability is to be doubled, trebled or quadrupled. Rather it seems more probable that, by doubling or trebling the limit of passenger liability, some of the present adherents, such as Brazil, France, Mexico and Portugal might be compelled to denounce the Convention. Surely the proposal to increase the present limit of passenger liability appears to be diametrically opposed to the stated purpose of attempting to obtain more universal acceptance by additional adherences!

The doubling or trebling or quadrupling of the limit of passenger liability could not fail to increase the average of claim settlements. This, in turn, would increase insurance premium costs and would impose an additional burden upon commercial air transportation companies at a time when every effort is being made by those carriers to reduce their operating expenses and to lower fares in order to stimulate a higher volume of traffic. It seems much fairer for those passengers who desire higher limits of protection to buy readily obtainable aviation accident insurance rather than to saddle this greater cost upon all passengers by means of higher fares.

Another probable effect, which may not have been foreseen by the proponents of raising the limit of passenger liability, is the great increase in litigation which seems almost certain to follow such an increase. At the present time, the limit is so low at $8,292 U.S. Currency that it seldom is worthwhile, from the air carrier's viewpoint, to litigate a claim to which the Warsaw Convention applies. Thus, it ordinarily is unnecessary for either the plaintiff or the defendant to incur heavy expense in an effort to prove the circumstances surrounding the accident. With doubled or trebled limits, however, there would be far more incentive for the air carriers to resist claims. The results of this cannot fail to be disadvantageous to the public as well as to the claims experience of those international airlines which may be so unfortunate as to suffer accidents which result in injury to or death of passengers. The increase in litigation expense also would tend to increase insurance premium costs.

In view of all of these adverse factors, it seems difficult to understand why it is proposed to double, treble or quadruple the limit of passenger liability.

Is there any substance to the oft repeated claim that the purchasing power of the present limit of passenger liability is too low? This question may be answered by examining Table I which shows the present-day (1948) purchasing power of 125,000 French Gold (Poincare) Francs, consisting of 65½ milligrams of gold nine-tenths fine.

Study of Table I reveals that the purchasing power of 125,000 gold (Poincare) francs, as defined in the Warsaw Convention, has declined

in eight of the nineteen countries for which the complete data are shown. These are as follows:

| *Country* | *% Decline in Purchasing Power* |
|---|---|
| *Belgium | —74.6 |
| *Brazil | —23.5 |
| Colombia | — 2.2 |
| *Czechoslovakia | —20.7 |
| Egypt | —17.1 |
| *France | —72.5 |
| *Portugal | —14.3 |
| *Sweden | — 2.2 |

* Adherent Nations

In all of the remaining eleven countries, although contrary to popular belief, the purchasing power of 125,000 Poincare francs actually has increased. These increases in purchasing power range from 1.0% in Switzerland to 49.8% in Australia, as follows:

| *Country* | *% Increase in Purchasing Power* |
|---|---|
| Argentina | +25.6 |
| *Australia | +49.8 |
| *Canada | +21.8 |
| *Denmark | +19.0 |
| *Mexico | + 7.0 |
| *Netherlands | + 6.4 |
| *Norway | +27.7 |
| *South Africa | +31.4 |
| *Switzerland | + 1.0 |
| *United Kingdom | +38.7 |
| *U.S.A. | +16.4 |

* Adherent Nations

The countries included in Table I were used because of the ready availability of the statistical data with respect to them and regardless of whether or not they are adherents to the Warsaw Convention.

The above table demonstrates that in many nations the purchasing power of the French Gold (Poincare) Franc has increased. Thus, without revising the convention, the existing liability limit already has been effectively increased as the result of the operation of well known economic laws.

The present Warsaw Convention has worked very well in practice for more than 19 years. It, therefore, would seem far more prudent for all air carriers to try to conform to, and to live with, the present Convention, despite certain admitted but nevertheless minor defects, rather than to run the risk of having no Convention at all.

Any radical change in the rules of liability would set naught the very substantial body of case law which has been built up so laboriously during the last nineteen years by a strong line of favorable judicial decisions upholding the present Warsaw Convention.

Moreover, unless all of the adherents to the present Convention should agree to accept a proposed new convention, it is quite possible that we should find ourselves in the unfortunate position of having two conflicting Conventions in effect at the same time covering the same subject matter. This could only cause greater confusion and lead to more difficulties both for the traveling public and for the air transportation companies.

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## TABLE I

### January 15, 1949

### Adequacy of Warsaw Convention Limit of Passenger Liability—Purchasing Power of 125,000 French Gold (Poincare) Francs, as Defined, Based Upon Cost of Living Index 1929=100

| | | 1. | 2. | 3. | 4. | 5. | 6. | |
|---|---|---|---|---|---|---|---|---|
| | | *Warsaw Convention Limit of Passenger Liability* | | | *Cost of Living Index 1948 1929=100* | | *Purchasing Power* | |
| *Country* | | 1929 | 1948 | % of 1929 | *Paper Basis* | *Gold Basis* | *Gain (+)* | *Loss (—)* |
| Argentina | P | 11,701 | 27,851 | 238.0 | 177.2 | 74.4 | + 25.6 | |
| *Australia | £ | 1,019 | 2,581 | 253.3 | 127.4 | 50.2 | + 49.8 | |
| *Belgium | F | 176,060 | 362,888 | 206.1 | 359.9 | 174.6 | | — 74.6 |
| *Brazil | C | 41,473 | 152,426 | 367.5 | 453.9 | 123.5 | | — 23.5 |
| *Canada | $ | 4,932 | 8,292 | 168.1 | 131.5 | 78.2 | + 21.8 | |
| Colombia | P | 5,073 | 14,545 | 268.8 | 292.7 | 102.2 | | — 2.2 |
| *Czechoslovakia | K | 165,473 | 413,360 | 249.8 | 301.8 | 120.7 | | — 20.7 |
| *Denmark | K | 18,276 | 39,755 | 217.5 | 177.7 | 81.0 | + 19.0 | |
| Egypt | £ | 983 | 2,009 | 204.3 | 238.9 | 117.1 | | — 17.1 |
| *France 1/48 | F | 125,000 | 987,143 | 789.7 | 1,850.9 | 235.1 | | —135.1 |
| 11/48 | | | 1,775,209 | 1,420.1 | 2,453.1 | 172.5 | | — 72.5 |
| *Mexico 6/48 | P | 10,166 | 40,305 | 396.5 | 506.0 | 127.5 | | — 27.5 |
| 11/48 | | | 57,226 | 562.9 | 522.6 | 93.0 | + 7.0 | |
| *Netherlands | G | 12,187 | 22,070 | 181.1 | 169.3 | 93.6 | + 6.4 | |
| *Norway | K | 18,351 | 41,131 | 224.1 | 162.0 | 72.3 | + 27.7 | |
| *Portugal | E | 109,575 | 205,655 | 187.7 | 214.5 | 114.3 | | — 14.3 |
| *South Africa | £ | 1,014 | 2,069 | 204.0 | 142.1 | 68.6 | + 31.4 | |
| *Spain | P | 33,365 | 90,802 | 272.1 | ? | ? | ? | |
| *Sweden | K | 18,297 | 29,803 | 162.9 | 166.4 | 102.2 | — 2.2 | |
| *Switzerland | F | 25,391 | 35,492 | 139.8 | 138.4 | 99.0 | + 1.0 | |
| *United Kingdom | £ | 1,006 | 2,057 | 204.5 | 125.3 | 61.3 | + 38.7 | |
| *United States | $ | 4,898 | 8,292 | 169.3 | 141.6 | 83.6 | + 16.4 | |

* Adherent Nations.

Column 1. Computed on basis of 1929 parity of various currencies in terms of U.S. dollars. See Statistical Year Book of the League of Nations 1942/44, Table 96(b).

Column 2. Computed on basis of 1948 values of various currencies in terms of U.S. dollars. See Federal Reserve Bulletin, December 1948, page 1549.

Column 3. Computed by dividing figures in column 2 by the corresponding figures in column 1.

Column 4. Computed by multiplying the Cost of Living Index for 1948 (1937-100) by the Cost of Living Index for 1937 (1929-100). See Monthly Bulletin of Statistics—United Nations November 1948, Table 61, page 150 *et seq.* 1942/44, Table 95, page 196 *et seq.*

Column 5. Computed by dividing figures in Column 4 by corresponding figures in Column 3.

Column 6. Computed by subtracting the index numbers shown in Column 5 from 100.

# EDITORIAL

## CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT — EARLY RATIFICATION DESIRABLE

On January 13, 1949, the President transmitted to the United States Senate the Convention on the International Recognition of Rights in Aircraft signed at Geneva on June 19, 1948, with a view to receiving its advice and consent to ratification. The leadership of the United States in promptly ratifying this important Convention will facilitate the financing and use of American air transports in international services both by United States and foreign operators. Its ratification is supported by all U. S. international air carriers, aircraft manufacturers, and financial institutions concerned with loaning funds on aircraft used in international services.

Modern transport aircraft now coming into intercontinental air service involve an expenditure of more than one million dollars per plane, with spare parts costing an added 15 to 20%.[1] These giant airliners are operated by the scheduled carriers in fleets up to 16 or more. The millions required for such equipment is beyond the financial resources of most airlines, even in prosperous periods, and the companies must turn to banks or government for financing their equipment purchases. But the world-wide mobility of transport aircraft has naturally made lending institutions hesitate to invest in aircraft until they can be assured that the priority of their security rights will be recognized in all countries to which the aircraft might be flown. This is the objective of the Convention.

The nature and priority of security liens on chattels is a field of private law wherein national concepts differ markedly. In the United States, many security devices are considered suitable for airline financing, particularly the equipment trust leasing device developed for railroad equipment purchases. Apparently other countries do not have our elaborate security devices, and few were willing to accept unreservedly those employed in the United States. Almost from the founding of CITEJA in 1926, consideration has been directed to drafting conventions relating to an aeronautical property record and to aircraft mortgages and other security interests. Early attempts to agree upon a "treaty mortgage," analogous to that found in maritime conventions, were not fruitful, and this approach would have sacrificed the flexibility of the various U. S. financing devices.

For this and other reasons, the Convention, as signed at Geneva, is not one of international unification, but of *mutual recognition* by the

[1] The Boeing 377 Stratocruiser is reliably reputed to cost $1,500,000 to $1,700,000; Pan American Airways has on order 20; American Overseas Airlines 8; United Airlines 7.

signatory states of security and property rights created according to the laws of the nationality of the aircraft. With American initiative, the difficult problems of conflicts of law presented by this approach were resolved by the drafters into a workable accord, as attested by the fact that the Convention has been signed by 23 countries, although none have deposited their ratifications.

Because of the different forms that title and security rights may take in various countries, Article One of the Convention begins by carefully enumerating four classes of rights that each signatory state agrees to accord recognition. Briefly, these are, (a) rights of property in aircraft (title or outright ownership), (b) rights to acquire aircraft by purchase coupled with its possession (purchase by conditional sale, or option rights under a hire purchase agreement or equipment trust), (c) rights to possession of aircraft under a lease of six months or more (equipment trusts and ordinary long term leases) and (d) mortgages, hypotheques, and similar rights in aircraft which are contractually created as security for payment of an indebtedness.

The basic concept of the Convention is that the contracting states agree to recognize the above-described rights upon two conditions and agree not to give other interests priority. The first condition is that the right in question must be constituted according to the law of the nationality of the aircraft—not to *lex loci contractus* or the intention of the parties—and the second, that it must be recorded by the state of the aircraft's nationality.

In addition to protecting creditors who may lend money on aircraft as security, the Convention provides some protection to third parties dealing with aircraft against hidden liens, defines privilege or priority claims which alone take priority over recorded liens (restricted to recent salvage claims and "extraordinary expenses indispensable for the preservation of the aircraft," but not including state "fiscal claims") and provides for transfer of aircraft title from one signatory state to another only on payment or consent of all recorded claims.[2] Extending the recognition of security rights to include fleet mortgages and spare parts presented many technical and novel problems.

The tersely worded Convention requires careful study. Because of the legal and technical nature of many provisions, particularly with respect to priorities, spare parts, and fleet mortgages, the JOURNAL has reprinted, beginning on page 70, the *annotated text* of the Convention as prepared by the Legal Subcommittee of the Air Coordinat-

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[2] The basic objectives of the Convention are discussed in a most enlightening article by R. O. Wilberforce, *The International Recognition of Rights in Aircraft*, 2 Int'l. L.Q. 421-58 (British, August 1948). A detailed commentary on the text is included from the British point of view. For the general background of the Convention, see, G. N. Calkins, *Creation and International Recognition of Title and Security Rights in Aircraft*, 15 J. of Air L. & C. 156-80 (1948) and note by A. O. Moore, "Some Principle Aspects of the ICAO Mortgage Convention" 14 J. of Air L. & C. 531 (1947).

ing Committee and transmitted to the United States Senate by the Department of State.

The annotations present the legislative history of significant phrases. While this study will reveal that the Convention has not solved all of the technical problems or eliminated all of the conflicting national points of view, it will convincingly demonstrate that the Convention is a workable international agreement—one that should be approved and promptly ratified by the United States and supplemented by enabling domestic legislation.

E. C. SWEENEY

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## STEPHEN LATCHFORD

When Stephen Latchford entered the Department of State in 1911, after six years previous service with the Government in the Panama Canal Zone, international air law was practically non-existent. When he retired from the service of the Department on July 30, 1948, international air law had become a powerful factor in world affairs. To this development Mr. Latchford made a very real and valuable contribution. As Secretary of State Marshall wrote him in a letter made public by the State Department:

> **"Your retirement from the Department of State is a significant loss to the Government. Your leadership has made considerable contributions to the work of international bodies in the fields of private and public air law. Your long background and specialized knowledge in international air law have made your services invaluable to the Department's considerations in this field."**

Those of us who had the pleasure of working with Mr. Latchford can more than endorse the commendation of the Secretary of State. The United States did not ratify the Paris Convention of 1919. It did, however, ratify the Pan American Convention on Commercial Aviation signed at Havana in 1928, and also entered into separate air navigation agreements with foreign governments not parties to the Havana convention. To Mr. Latchford the State Department looked for expert legal guidance in connection with these new international air law commitments.

It was always his view that the United States should assist in the unification of the rules of private air law so that ultimately they might be the same wherever aircraft flew on international routes. He was instrumental in urging that the United States become a member of the CITEJA in 1932 and that it be represented at the Third International Conference on Private Air Law held in Rome in 1933. Until then the United States had never been represented by official delegations at any of the great private air law conferences held in Europe. The accurate, clear and learned instructions to the United States delegation at the

Rome conference were drafted by Mr. Latchford and guided the delegation at that conference developing rules of liability for damage caused by aircraft to third persons and property on the surface.

The following year he became one of the United States members of CITEJA, and in the same year prepared the data on the basis of which the State Department recommended that the Warsaw convention be sent to the Senate for ratification. In 1938 he served as vice chairman of the delegation at the Fourth International Conference on Private Air Law held at Brussels. He also attended many sessions of CITEJA as chairman of the U. S. Section, and became one of the first U. S. members on the Legal Committee of ICAO.

He participated actively in the important negotiations in 1935 between the United States and British, Canadian and Irish authorities, which resulted in the later exchange of flight permits for the world's first trans-Atlantic air transport service opened in 1939. Even more important was his contribution toward the drafting of the Chicago convention in 1944. When the United States issued the call for the conference which was held in Chicago in 1944, Mr. Latchford was assigned the task of preparing the preliminary draft of a new international convention to be presented by the United States. Many of the principles in Mr. Latchford's draft appear in the final text of the convenion now in force.

Although Mr. Latchford has retired from public service, his influence will continue for many years. Public officials and scholars fortunately have the benefit of the carefully prepared and excellent articles which he wrote at various times. Those of us who continue to work in the field of international air law with which he was so long associated will always be deeply in debt to the breath of his knowledge and to the accuracy of his statements.

Stephen Latchford has been a devoted and loyal public servant, a good citizen, and an able lawyer. The world owes him much.

JOHN C. COOPER,
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# INTERNATIONAL

## INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

Department Editor: Joan H. Stacy*

### I. Introduction

THE Fifth Session of the ICAO Council, held in Montreal September 7, 1948, through December 10, 1948, saw the reconstitution of the Air Transport Committee in accordance with the Second Assembly's resolution and the circulation of a request to Contracting States that they submit their nominations for the Air Navigation Commission by January 10, 1949. Lengthy debate in this session prior to its adoption of the Operating Practices (OPS) Annex to the Convention on International Civil Aviation emphasized the need for carrying out other recommendations of the Second Assembly.

### II. Organization and Procedure

On October 12, 1948, the Council adopted a resolution whereby the Air Transport Committee was reconstituted as a committee of twelve representatives of Council Member States as follows: Argentina, Australia, Belgium, Canada, China, France, Iraq, Mexico, The Netherlands, Sweden, the United Kingdom, and the United States. Dr. Paul T. David, of the United States, was elected chairman of the new committee, which with its membership confined to Council Member States should be a real subsidiary working group of the Council.

On the same date the Secretary General of ICAO sent a letter to all Contracting States drawing their attention to the Council's resolution of October 5 requesting each to nominate one candidate for a twelve-member Air Navigation Commission of technically qualified representatives of Council Member States. In connection with the establishment of the Air Navigation Commission, the Council drew up terms of reference for the new body. The terms of reference give the Commission the duty of advising

> "the Council on methods for ensuring that the responsibility of the Council remains undivided and that duplication is avoided in the consecutive steps on air navigation matters."[1]

Members of the Council elected during this session to its working committee on Joint Support were Argentina, Australia, Canada, France, India, The Netherlands, Portugal, the United Kingdom, and the United States. Sir Frederick Tymms, Council Representative for the United Kingdom, was elected chairman. Elected to the Council's Finance Committee were Canada, China, France, Ireland, Mexico, the United Kingdom, the United States, and Sweden with Mr. C. S. Booth as chairman.

The Council, by authority granted in Second Assembly Resolution A2-10, abolished the Committee on the Convention on International Civil Aviation and approved the following steps for handling amendments to the Convention:

1) Referral by Council of proposed amendment to one of its committees;

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[1] *Council, Fifth Session, Minutes of the Tenth Meeting*, ICAO Doc. 6226, C/704, 26/10/48. The terms of reference, among other things, specify that "each member of the Commission and each alternate shall be paid by and shall serve under the responsibility of the state which nominated him."

2) Preparation of draft amendment by the committee in consultation with the Legal Bureau; 3) Optional referral by Council of draft amendment to working group of its own or to the Legal Committee; 4) Submission of the proposed amendment to the Assembly.

It also established the following schedule for the presentation of amendments to the 1950 Assembly:

November 1948—Contracting States to be advised to submit by February 28, 1949, their initial proposals for amendments which they consider essential; January - September 1949—Proposed amendments to be considered by appropriate bodies of the Organization on the basis of documentation prepared by the Secretariat; Prior to April 1949—Council to consider desirability of amending Article 94, the Convention's article on amendment procedure; September 1949—Council to consider all other proposed amendments; January 1950—Proposed amendments to be considered by Contracting States.

The Council also decided that an individual could be an accredited representative of more than one State at regional, divisional or similar special meetings but that he could vote only on behalf of the State which he primarily represented.

### III. Air Navigation Matters

The Fifth Session of the Council saw the adoption of Annex 6 to the Convention on International Civil Aviation, covering International Standards and Recommended Practices for Operation of Scheduled Air Services. The Air Navigation Committee had devoted sixty meetings and the Council ten meetings to the review of this Annex, which had originated in the Operating Practices Division in March 1947.

On December 10, 1948, when the Annex was adopted, the United States Representative on the Council made a speech in which he suggested that certain changes be made in the working methods of the Organization, so that the technical standards set by it might be kept abreast of aviation's progress. The Acting Council President concurred in the need for the Council's giving a high priority on its agenda to this matter.

In addition, the Air Navigation Committee in the fall of 1948 completed most of its work on a draft annex on airworthiness and began work on a draft annex on radio aids to air navigation, based on the Final Report of the Special Radio Technical (COT) Division. The Committee and the Council approved the final reports of the North Pacific, North Atlantic, and European-Mediterranean Regional Air Navigation Meetings, the special meeting held in London in September 1948 on aerodrome lighting in the European-Mediterranean and North Atlantic Regions, the third session of the Rules of the Air and Air Traffic Control (RAC) Division, and the COT Division as well as an amendment to Annex 4 (Aeronautical Charts) of the Convention, which is now in effect. As a result, certain new ICAO Procedures for Air Navigation Services have been or will be implemented and new International Standards and Recommended Practices will eventually come into force.

During its fifth session, a Council resolution approved the United States and Canadian interpretation of Annex 2 (Rules of the Air) with regard to the use of instrument flight rules. Need for this interpretation had arisen in connection with the Council's action in adopting the Annex.

The Organization, in accordance with the request of the International Telecommunications Union Aeronautical Frequency Conference (June-September 1948), began work on the establishment of worldwide frequency requirements in the Aeronautical Mobile Band. Regional aeronautical frequency requirements were put on the agenda of the South-East Asia

Regional Air Navigation Meeting, held in New Delhi November 23-December 14, 1948. They were also the subject of a special European-Mediterranean frequency meeting being held concurrently with the ICAO Communications Division Meeting, which convened in Montreal on January 11, 1949, to consider the ITU's draft frequency allotment plan for the air routes of all fifty-one ICAO Member States among other problems. A joint ICAO-ITU meeting on allotment of frequencies in the Western Hemisphere will be held in the United States in March 1949 conjointly with the Fourth Inter-American Radio Conference.

The South-East Asia Regional Air Navigation Meeting, in addition to handling frequency problems already mentioned, examined existing air navigation facilities in the region and made recommendations for their improvement and drawing up of special regional operating procedures. Several such meetings were scheduled for the early part of 1949.

## IV. Air Transport Matters

On November 1 the last meeting was held of the old Air Transport Committee, membership on which had been open to all ICAO Member States, and on November 3 the new Committee of the Council began work.

With the exception of registration of agreements with the Organization, the Final Report of the Second Session of the Facilitation (FAL) Division[2] occupied both the old and new Committees during most of the fall. Much time was devoted to the redrafting of the proposed FAL Annex to the Convention. The draft Annex submitted to the Committee by the FAL Division was reviewed and changes were made so as to clarify and simplify these Standards and Recommended Practices, which the Committee voted to define as follows for FAL purposes:

> "Standard—Any specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspect of international air navigation which has been adopted by the Council pursuant to Article 54(1) of the Convention, and in respect of which noncompliance must be notified by States to the Council in accordance with Article 38.
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> "Recommended Practice—Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54(1) of the Convention, and to which Contracting States will endeavor to conform in accordance with the Convention."[3]

Although necessary to make substantial changes to bring the draft Annex in line with the new definitions, very few changes were made in the substantive meaning of the Division's draft. Since the Committee did not complete its work on the Annex before it adjourned on December 9, the Annex is its first item of business for 1949. It has been estimated that the Committee's work on the Annex will probably be completed by February 1949 and that the Council may adopt it in March.

Other items on the Committee's agenda are the completion of action on the Statistics Division Report,[4] including the drafting of Council resolutions on airport statistical reporting and accident analysis and statistics; consideration of the Secretariat's draft study on air navigation facility user charges and draft request to Member States for their views on this subject; relationship of the Organization with IATA, particularly on air mail mat-

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[2] *Final Report of the Second Session, Facilitation Division,* ICAO Doc. 5464, FAL/535, June 1948.

[3] *Air Transport Committee, Fifth Session of the Council, Minutes of the Seventh Meeting,* ICAO Doc. 6333, AT/679, 13/12/48.

[4] *Final Report of the Statistics Division, First Session—January* 1948, ICAO Doc. 5205—STA/526, March 1948.

ters; and consideration of replies from Member States on scheduled and non-scheduled international air services and on applicability of their laws and regulations to the various categories of international air transport services, as required by the Second Assembly's Resolutions A2-17, A2-18 and A2-19.

Another economic study to be undertaken by the Committee is that on burdensome insurance requirements, based on views of Member States submitted on or before December 3, 1948 in accordance with Second Assembly Resolution A2-20. Consideration will also be given at the next session to a working paper on administrative problems connected with the nationality of aircraft flying under international operating agencies. The Committee will also have to devote some time to the consideration of draft rules on registration of agreements to be prepared, on the basis of drafts submitted by the United States and the Secretary General.

If the Air Transport Committee is able to carry out this heavy work program during its next session, substantial progress may be made at an early date by the Organization in the preparations for the work of the Economic Commission of the 1950 Assembly.

## V. Legal Matters

On October 26, 1948, the Council agreed to carry out the recommendations of the Third Session of the Legal Committee with regard to circulation of three questionnaires to ICAO Member States. One deals with the limits of liability concerning passengers, cargo, and baggage in the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air and the desirability of changing them. The second questionnaire concerns possible revision of the Rome Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, the supplementary Brussels Protocol, and the draft Convention concerning aerial collisions prepared by CITEJA. The third is on the subject of the Brussels Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea and the draft Convention for the unification of certain rules relating to assistance and salvage of aircraft by aircraft on land, the desirability of revising them, and the possibility of a single convention to deal with assistance to both ships and aircraft in distress.

Early in January 1949 Denmark, Norway, and Sweden signed the Convention on the International Recognition of Rights in Aircraft, making the total number of States which have signed the Convention (since its opening for signature at the Second ICAO Assembly) twenty-three. The United States is one of the signatory States, and advice and consent of the United States Senate to ratification of the Convention have been requested by the President.

## VI. General

Consents to assessment for the Joint Support of air navigation services in Iceland were received from the United States, the United Kingdom, The Netherlands, Canada, Denmark, and Sweden, representing more than 80% of the total assessment, the percentage necessary to make them effective as provided in the Final Act of the Conference on Air Navigation Services in Iceland.[5]

On December 23, 1948 the Secretary General of ICAO, in accordance with a decision of the Joint Support Committee, sent a letter to the ten States,

[5] *Conference on Air Navigation Services in Iceland, Final Act*, ICAO Doc. 6073, JS/532, 29/7/48.

parties to the North Atlantic Ocean Weather Ship Station Agreement,[6] requesting their views on the holding of a meeting to consider revision and renewal of the Agreement, and certain technical problems. The Agreement, which expires June 30, 1950, calls for the convening of such a meeting by April 1, 1949.

The ICAO Council during its fifth session delegated to its President authority to prepare for the holding of a meeting of States interested in the Joint Support of Greek airports.

The United Nations on November 18, 1948 approved Finland's membership in ICAO, but that country will not actually become a member until deposit by the Finnish Government of its instrument of adherence to the Chicago Convention.

The Second ICAO Trainee Program is scheduled to begin January 17, 1949 when nominees of six contracting States—Haiti, China, Bolivia, Dominican Republic, India, and Pakistan—will be given a six-month training course in Montreal on all phases of the work of the Organization—technical, economic, and administrative. The training of the first group of six aviation specialists from various countries, completed in June 1948, has given the Organization some experience as a basis for improving the curriculum of the new group.

JOAN H. STACY

## INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

Intensive study is being given to the possibility of a new structure of passenger fares and cargo rates for international services of IATA members as the result of the second meeting of the joint and composite Traffic Conferences of the Association at Bermuda during November.

After a lengthy discussion, representatives of IATA member airlines from all parts of the world agreed in principle on the desirability of introducing tourist-class service at lower fares and assigned the subject, among others, to a special high-level committee of airline traffic executives for study at Brussels late in January. Pan American World Airways, impressed by the success of its tourist fare between New York and San Juan, Porto Rico, was the moving force in this project.

The proposals before the traffic group include, in addition to tourist class fares, special off-season rates, excursion fares and other means whereby the cost of international air transport to the traveller can be lowered and the service made available to a larger market.

In making its studies, the group will take into consideration such problems as cost of operation and uniform criteria by which tourist-class service can be differentiated from the present standard. The report of the group will be considered by a special session of the composite Conferences in Europe during May. If it is accepted, the new structure of rates and fares could be put into effect during the Fall season of 1949.

In the meanwhile, the Conference meetings at Bermuda voted unanimously to hold the line on present passenger fares and cargo rates throughout next Summer, except for small increases between Europe and South America and minor adjustments elsewhere. Although costs of equipment, fuel, materials and services were found to be generally rising, the airlines hoped that an increasing volume of traffic would enable them to maintain the existing IATA Conference rate structure through the Summer.

[6] *PICAO Conference of North Atlantic States on Ocean Weather Observation Stations in the North Atlantic, London, September* 17-25, 1946, *Final Act and International Agreement on North Atlantic Ocean Weather Stations,* PICAO Doc. 2136, C/235, October 1946.

## ANNOTATED TEXT OF CONVENTION ON INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT—PREPARED BY THE LEGAL SUBCOMMITTEE OF THE AIR COORDINATING COMMITTEE*

### ARTICLE I

(1) The Contracting States[1] undertake to recognize:

[1] Although the term "Contracting State" is not defined in the Convention, it is obvious that it includes only those countries with respect to which the Convention has come into force and who have not denounced it.

(a) rights[2] of property[3] in aircraft;

[2] The word "right" has been used consistently throughout the Convention. *See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722 p. 231.

[3] This clause was inserted primarily to cover outright ownership of the aircraft where legal and beneficial ownership are combined. *Minutes, First Session, Legal Committee, ICAO Doc.* 4635, *pp.* 36, 37. There is a possibility, however, that the phrase is broad enough to cover a conditional right of property, such as the conditional sale. On this point there appears to be a split of authority in the United States, since some jurisdictions hold that the interest of the conditional vendee is not a property right, whereas others hold that it is. Insofar as aircraft are concerned, the Civil Aeronautics Board has held that the vendee pursuant to a contract of conditional sale was the "owner" of the aircraft for purposes of registration as to nationality. *O'Connor-Registration of Aircraft,* 1 CAA 5 (1939).

Irrespective of whether or not a conditional sale is covered under this clause (a), there is no doubt that it is covered under clause (b), and the legislative history of the Convention indicates that the Civil Code lawyers intended clause (b) to cover this type of transaction. *Minutes Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722, *p.* 176. *Report and Commentary ICAO Doc.* 4635, p. 253.

Apart from the conditional sale, the secured creditors interest in other security devices where title is retained will definitely be protected under this clause. *Minutes, 1st Session, Legal Committee, ICAO Doc.* 4635, p. 37.

(b) rights to acquire aircraft by purchase[4] coupled with possession[5] of the aircraft;

[4] See note 3. The purpose of this clause, apart from its application to conditional sales, was to protect the option right of a purchaser under a hire-purchase agreement or equipment trust to have the property in the aircraft transferred to him in accordance with the terms of his agreement.

[5] The recognition accorded this right is not an absolute one however. The buyer must be in possession of the aircraft in order to bring the terms of the Convention into play. Thus if the purchaser under a hire purchase agreement or equipment trust were to lease his equipment to a third party, he would no longer have the possession of the aircraft, and his right to acquire the property in the aircraft might not be recognized in a foreign jurisdiction. This is not considered to be a vital objection, however, since it was the only basis on which certain important countries would consent to the inclusion of this clause at all.

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* The text of the Convention was originally published in the Summer 1948 issue, 15 J. Air L. & C. 348, and the annotations are here offered for the information of counsel who wish to study the legal and technical implications of the text.

ARTICLE I (Cont.)

(c) rights to possession[6] of aircraft under leases[7] of six months[8] or more;

[6] It will be noted here that unlike clause (b) the *right to possession* is recognized. Hence where there is a sublease, the sub-lessor will be protected as against the original lessor.

[7] The primary purpose of this clause is to safeguard the right of a purchaser of an aircraft under an equipment trust or hire-purchase agreement to the continued possesssion of the aircraft pursuant to his contract, as against an attaching creditor of the security title holder.

[8] The six month period was chosen as one which would cover all *bona fide* financing transactions, and at the same time not require courts to consider as rights against the aircraft many small claims for short-term leases, where the objective was not to financing the purchase of the aircraft. Although primarily intended to promote the financing of aircraft, this clause is certainly broad enough to cover long-term leases as such.

(d) mortgages,[9] hypotheques[10] and similar rights[11] in aircraft which are contractually[12] created as security[13] for payment of an indebtedness;[14]

[9] This language was intended to cover all types of mortgages, both of the title type and the lien type. (In this note and in many subsequent annotations statements are made that it was "intended" to accomplish a stated purpose. When such statements are not supported by citations to the Minutes, they are based on the recollection of Mr. G. N. Calkins, Jr., United States representative in the drafting committee at both Brussels and Geneva.)

[10] Because the concept of the French mortgage differs somewhat from the common law concept, particularly the title mortgage, it was decided to use the French name to indicate the definite intention to cover the field of mortgages.

[11] "Similar rights" was employed as a catch-all to take care of any other possibility for financing aircraft which is in the nature of a mortgage. It was not, however, the intent to cover either hire-purchase agreements, conditional sales, or equipment trusts under this heading.

[12] It was the intent here to limit the type of mortgage accorded recognition to those which have been created by agreement, and to eliminate those which might arise by operation of law (such as the interest a wife might have in an aircraft belonging to her husband, somewhat analogous to a dower interest—as well as the case where a judgment might be considered as encumbering the aircraft). *See Minutes, First Session Legal Committee, ICAO Doc.* 4635, *pp.* 35 *et seq.*

[13] This further limits the clause to cases where there is a *bona fide* security or financing transaction. It of course would not include partnership rights, or rights of a purely equitable nature, as for example, the rights of a *cestui que trust* under a trust agreement or the right of the holder of an equipment trust certificate.

[14] The word "indebtedness" was employed to indicate an obligation which can be translated into money at the time the right is questioned. The word "debt" was rejected in drafting committee for fear of its connotation in early English common law. It accordingly is sufficiently broad to cover future advances, if they have been made at the time the right is questioned. *See Comments received by the Government of India, July* 24, 1947, *ICAO Doc.* 4548. *Comment of Government of Sweden, ICAO Doc.* A2-LE/31, p. 292.

**ARTICLE I (Cont.)**

**provided that such rights**

**(i) have been constituted[15] in accordance[16] with the law[17] of the Contracting State in which the aircraft was registered as to nationality[18] at the time of their constitution,[19] and**

[15] Created or brought into being.

[16] The words "in accordance with" were originally inserted in the Brussels draft convention, ICAO Doc. 4627, for the express purpose of permitting the inclusion of a country's law of conflict of law as well as its municipal law. *See Minutes, First Session, Legal Committee, ICAO Doc.* 4635, *p.* 41. Thus a right in an aircraft in State X would be safeguarded by the Convention even if the right had been constituted in State Y, in conformity with the law of the latter country—so long as State X's law of conflict of laws would apply the law of State Y.

It is extremely doubtful this result was intended when the matter was again discussed at Geneva. The Legal Commission definitely voted in favor testing the validity of a right pursuant to the law of the country in which the aircraft was at the time registered as to nationality, and this vote was regarded as rejecting a counter proposal that the right be tested by the law of the place where the rights were constituted. *See Legal Commission Minutes, 2nd Assembly, ICAO Doc.* 5722, *pp.* 33, 34. On page 35 of the same document a proposition that the phrase "law of the Contracting State" should include that state's law on conflict of laws was defeated by a vote of 9 to 8. The Brussels' phraseology was however retained by the drafting committee, and when the subject was discussed at the second reading of the text, the Commission did not insist on having the word "internal" placed in the text. *Legal Commission Minutes, 2nd Assembly, ICAO Doc.* 5722, pp. 174, 175.

Despite the somewhat doubtful history of the development of this provision, the representatives to the Legal Sub-Committee of the Air Coordinating Committee are of the unanimous opinion that the "law of the Contracting State" includes that country's rules on conflicts of law.

[17] A parallel difficulty for the United States is presented by the phrase "law of a Contracting State". It was definitely intended that this phrase would cover the law of sub-jurisdictions.

[18] This is the registration as to nationality contemplated by Articles 17-21 of the Convention on Civil Aviation signed at Chicago, December 7, 1944.

[19] Irrespective of whether the "law of the Contracting State" includes its law on conflicts of law, it is evident that the provision of this paragraph precludes a court sitting in a country other than that of the aircraft's registration from applying its own rules of conflicts of laws. In any case such a court is required to look to the country where the aircraft was registered at the time the right was created.

**(ii) are regularly[20] recorded[21] in a public record[22] of the Contracting State in which the aircraft[23] is registered as to nationality.**

[20] This refers to compliance with recording formalities. *See Draft Minutes, Legal Commission, 2nd Assembly, Assembly Doc.* A2-LE/4 *p.* 3 *et seq.*

[21] In drafts of this convention prior to the draft produced by the Fourth Commission of the First ICAO Assembly, there had been a mandatory requirement for the Contracting State to maintain a record. It was decided at Montreal to abandon all idea of making the recording procedures uniform throughout all countries parties to the Convention. Instead, the only sanction to maintain a record, if it can be called such is the fact that rights in

**ARTICLE I (Cont.)**

**aircraft will be required to be recognized by other Contracting States only when they have been recorded.**

[22] The Convention is not designed to foreclose a Contracting State from maintaining as many "records" or registers as it may desire. However, it should be noted that by Article II (1) all the rights relating to a given aircraft must appear on the same record, and consequently it is not open to a Contracting State to permit recording of one right in one record and a second right in another record. From the point of view of the United States, there is no compulsion to record in the Federal record other than the strong sanction of making such rights invalid as against third persons without notice if not recorded. It should also be noted that the record or records maintained by the Contracting States must be public records. Although there was no discussion in either the Legal Committee or the Legal Commission of the Second Assembly as to what the word "public" meant, the intention of the draftsmen of the Convention was that the record should be one open to the public. This interpretation is borne out by the language of Article III (3).

[23] It will be noted that the requirement as to regularity of records is in the present tense. It was drafted in this manner to insure that the test of regularity of a given recording is measured by the law of the country where the aircraft is registered as to nationality at the time the recording is questioned. As an example, if an aircraft of U.S. registry is encumbered with a mortgage recorded in the United States pursuant to our formalities and then the aircraft is subsequently transferred to the French registry together with the mortgage, the question of whether or not the recording in France is regular is to be determined under French law, not United States law.

> **The regularity of successive recordings[24] in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to nationality at the time of each recording.**

[24] The purpose of this paragraph is to insure that, in a case where a given aircraft is transferred from one nationality to one or more successive nationalities, the question as to the regularity of a recording in a country of prior registration should be governed in accordance with the law of that country. *See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722, p. 34.

> **(2) Nothing in this Convention shall prevent the recognition[25] of any rights in aircraft under the law of any Contracting State; but Contracting States shall not admit[26] or recognize any right as taking priority[27] over the rights mentioned in paragraph (1) of this Article.**

[25] This provision was inserted in the Convention at the request of the English delegation in order to make it amply clear that Contracting States could recognize rights in aircraft established under the laws of other Contracting States but which would not qualify in accordance with Article I (1). This would permit a Contracting State to recognize an unrecorded mortgage. *See Minutes, Legal Commission 2nd Assembly, ICAO Doc.* 5722, p. 177.

[26] The word "recognize" has been used consistently in the Convention to denominate the action of a State with respect to a right created in a foreign country. The purpose of this clause is to prevent the displacement of any such recognized rights coming under Article I by other rights. With regard to foreign created rights, the word "recognize" would be sufficient. How-

ARTICLE I (Cont.)

ever, it can scarcely be said that a country "recognizes" a right created in its own territory pursuant to its own law. For this reason, the word "admit" was included in the prohibition so as to prevent a State from either placing a foreign right ahead of an Article I (1) type right or admitting a right created in its own territory ahead of Article I (1) rights.

[27] The word "priority" here must be held to mean priority over those rights mentioned in Article I which are held as security for a debt. Cf. French text, which uses the word "grevant" (encumbering). Consequently, this provision permits a Contracting State to recognize an unrecorded mortgage or lien as against the owner of an aircraft even where his ownership is recorded.

## ARTICLE II

(1) All recordings relating to a given aircraft must appear in the same record.[28]

[28] One of the conditions upon the recognition of a right mentioned in Article I (1) is that the right be recorded in a public record of the Contracting State in which the aircraft is registered as to nationality. The provision set forth in Article II (1) is an amplification of that condition in that it requires all rights with respect to a given aircraft to be entered in the same record. This contemplates the possibility that a State may desire to maintain several records for administrative or other reasons. In such a case this provision would require that all recordings relative to a given aircraft appear on the same record. *See Minutes, Legal Commission, 2nd ICAO Assembly, Assembly Doc.* 5722, pp. 180, 181.

(2) Except as otherwise provided in this Convention, the effects[29] of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

[29] This provision adopts the law of the Contracting State in which the aircraft is registered as to nationality so far as the effects of recording are concerned with regard to third parties.

(3) A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law.[30]

[30] One of the principal questions discussed in the Legal Commission of the 2nd Assembly in Geneva in June of 1948 was whether or not a Contracting State under the Convention would be obliged to recognize for the purpose of recording a pre-existing right encumbering an aircraft formerly registered in another State. That is to say, that if an aircraft of United States manufacture is encumbered with a mortgage under United States law and the aircraft then is transferred to Brazilian registry, would the Brazilian Government be required to record the right formerly carried on the United States register. Such a requirement might mean in certain cases that one country would be forced to accept, recognize, and enforce a right which its domestic law did not permit to be created in its territory. The Brussels draft of the Convention was not clear on this point, and after considerable debate it was decided over the objection of the United States to include this provision. By the use of the word "prohibit" it was intended to permit the State concerned to prevent the recording of such a right even though there is no express provision in that country's statutory law prohibiting recordation of such a right. *See Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722, pp. 182, 183, 230, 231.

In the opinion of the representatives to the Legal Sub-Committee of the Air Coordinating Committee there exists no prohibition in the United States

**ARTICLE II (Cont.)**
against the recording with the Civil Aeronautics Administration of a right created under the law of any country.

**ARTICLE III**

**(1) The address of the authority[31] responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.[32]**

[31] By the use of the word "authority" it was intended to cover every possibility through which a record might be maintained. It obviously includes an administrative authority such as the Civil Aeronautics Administration, and is broad enough to include a court where a record is kept by a court, as is the case in Germany. *See Richter Report submitted to the CITEJA on Preliminary Draft Convention relating to aircraft mortgages (Oct.* 1931).

[32] It is important to bear in mind the difference between registration as to nationality in this Convention and a recording. In certain countries they can both be effected in the same record. However, the concepts are entirely different, the registration as to nationality being required by the Chicago Convention, whereas recording of rights in aircraft is an entirely permissive matter insofar as this Convention or the Chicago Convention are concerned. Since every aircraft must carry a certificate of registration as to nationality, it was deemed advisable to require the address of the authority responsible for maintaining the record of rights to be carried on this particular certificate. In this way, when a country maintains more than one record, the particular record, on which the rights are carried must be shown.

The provisions of this Article III (1) are regarded as constituting a direction to the Administrator of Civil Aeronautics to carry them out.

**(2) Any person shall be entitled to receive from the authority duly certified copies or extracts[33] of the particulars recorded. Such copies or extracts shall constitute prima facie[34] evidence of the contents of the record.**

[33] This provision indicates another attribute of the public character of the record. The right to obtain copies or extracts from public records is one which is well recognized in all commercial countries, and consequently, there is nothing novel in this provision. The word "extracts" was included to permit the furnishing of copies of less than an entire document. In the case of the United States where mortgage indentures frequently exceed a hundred pages, this provision is highly desirable.

[34] Prior to the draft of the Convention produced at Brussels by the Legal Committee at its First Session, the drafts of the Convention had stated flatly that the copies or extracts should constitute evidence of the contents of the record. The words "prima facie" were inserted to indicate that any such copy or extract could be impeached by proof that they were not true copies in fact of what they were reported to be. *See Minutes, 1st Session Legal Committee, ICAO Doc.* 4635, p. 43, 46.

**(3) If the law of a Contracting State provides that the filing of a document for recording shall have the same effect as the recording,[35] it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.[36]**

[35] The terms "record," "recording," and "recordation" are used in the Civil Aeronautics Act somewhat loosely when measured by European standards. The actual practice is to receive a document which is admitted for

ARTICLE III (Cont.)

recordation and to place it in a file bearing the number of the aircraft's certificate of registration. All papers concerning that aircraft are filed in this same folder, and may be inspected by the public. In the concept of many European countries, where all the rights in a given aircraft are listed on a page of a large loose-leaf book, such a system is not a true recording system. In Europe the instruments themselves may not be set forth in full in the book, but a mere description of the right which they create is listed on the appropriate page. For this reason Article III (3) was inserted in the Convention to make sure that both systems contemplated were covered by the Convention. It will be noted that the law of the Contracting State must provide that the filing of the document for recording shall have the same effect as recording. A second reason for the insertion of this provision is to make sure that where the law of a Contracting State regards the receipt of a document for recordation as tantamount to recordation itself, even though the document has not officially been copied or otherwise entered on the record, other Contracting States will regard it as having been duly recorded from the time of such receipt.

[36] This provision merely insures that the document filed for recording will be open to public inspection. This is regarded as a direction to the Administrator to implement this provision.

**(4) Reasonable[37] charges may be made for services[38] performed by the authority maintaining the record.**

[37] There was considerable debate in the First Session of the Legal Committee at Brussels as to the inclusion of this provision. It was finally decided to include it in order to counteract any implication that Article III (2) required the authority to furnish copies or extracts free. The word "reasonable" was included as a limitation on the charge which may be made. *Minutes of 1st Session Legal Committee, ICAO Doc.* 4635, *p.* 43, *et seq.*

[38] The word "services" was designed to include not only the furnishing of copies of extracts but also to cover fees for recording any rights under the Convention. *Minutes of 1st Session, Legal Committee, ICAO Doc.* 4635, p. 47.

ARTICLE IV[39]

**(1) In the event that any claims[40] in respect of:**

**(a) compensation[41] due for salvage[42] of the aircraft, or**

[39] This Article represents treatment accorded so-called "privileged" claims, or those claims which have priority over any recorded mortgage or other security interest. The United States delegations throughout the development of this Convention have been opposed to the inclusion of any provision relating to privileged claims. However, the idea of privileged claims is a traditional one in the minds of Continental lawyers, and for this reason it was necessary to include a provision of this nature. The types of claims permitted, however, are very restricted.

[40] The word "claims" was used to indicate a money demand of any type.

[41] Despite the use of the word "due" in this connection, it is apparent from the context of the Article that the amount owing is not required to be liquidated at this juncture. In short, the compensation referred to may be in an undetermined amount.

[42] As used in this text it is apparent from the legislative history of the Convention that salvage includes not only the possibility of salvaging aircraft at sea but also the salvage of aircraft on land. *Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722, *pp.* 132-136. It was the understanding of the Legal Commission at Geneva at the Second Assembly that

**ARTICLE IV (Cont.)**

salvage will arise only where the aircraft is in distress from which it could not save itself through its own efforts, and that through the *aid given by the salvor,* the aircraft is rescued. *Minutes, Legal Commission, Second Assembly ICAO, ICAO Doc.* 5722, p. 136.

**(b) extraordinary[43] expenses indispensable for the preservation[44] of the aircraft**

**give rise, under the law[45] of the Contracting[46] State where the operations of salvage or preservation were terminated, to a right conferring a charge[47] against the aircraft, such right shall be recognized by Contracting States and shall take priority over all[48] other rights in the aircraft.**

[43] The word "extraordinary" was inserted to indicate that ordinary, routine expenditures were not intended to be covered by this clause. Only those expenses which are out of the ordinary and are not recurring are intended to be covered in this paragraph. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635, p. 56.

[44] The word "preservation" was used to indicate that the expenses must be necessary for the maintainance of the aircraft in the condition in which it was prior to the time the expenses were incurred. It does not include any expenses which add to or increase the value of the aircraft, and therefore would not include repairs. *See Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722, p. 186, 187, 188.

[45] It will be noted that the Convention does not create a right of salvage or reimbursement for extraordinary expenses, but merely affords such rights, created apart from the Convention, appropriate recognition.

[46] It was intended here to give a situs to the operations of salvage and for extraordinary expenditures so that it could be easily determined whether or not the salvor or person incurring the expenditures was entitled to a priority. For the purpose of this phrase, salvage operations should be considered as terminating when the aircraft is brought to a port of refuge. More difficulty would be encountered possibly in the case of salvage of aircraft on land where the aircraft is transported from one country to another by the salvor. Presumably so long as an aircraft is in the custody of the salvor, the operations of the salvage will not terminate.

[47] In order to avoid confusion throughout the Convention the word "right" has been used to indicate any right in aircraft. Prior to the Geneva draft, however, the word "charge" had been used to indicate a lien or encumbrance on the aircraft as differentiated from a right of ownership. In order to avoid giving rise to a construction that something different from a right was intended by "charge", the phrase "right conferring a charge" was used.

[48] This obviously includes rights mentioned in Article I.

**(2) The[49] rights enumerated in paragraph (1) shall be satisfied in the inverse order of the dates of the incidents in connection with which they have arisen.**

[49] The rule set forth herein is an adaptation from the maritime rule relating to the settlement of privileged claims. *See Report and Commentary on Brussels Draft Convention, ICAO Doc.* 4635, p. 254.

**(3) Any of the said rights may, within three months from the date[50] of the termination of the salvage or preservation operations, be noted on the record.[51]**

[50] By the use of the word "noted" the draftsmen intended a difference between a recording under Article I and a notation of a priority right under

**ARTICLE IV (Cont.)**

Article IV. Notation is not, properly speaking, recordation. One of the reasons for this differentiation is that the amount and the validity of a claim for extraordinary expenses or for salvage may not be determined at the time a claim is noted on the record. In most countries an invalid right may not be recorded.

In the original reading at the Second Session of the Legal Commission there was a comment by Brigadier Wilberforce that the word "recorded" was actually intended in this subparagraph. *See Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722, *p.* 164. However in the final draft of the Convention the word "recorded" was changed to "noted" in the English version and "inscrit" to "mention" in the French version. The change was apparently accomplished in the drafting committee since there is no indication in the minutes of a reversal on this point. *See, however, Statement of Swedish Delegate* A2-LE/13, *p.* 9.

[51] This provision is regarded as constituting a specific direction to the Administrator of Civil Aeronautics to place any claim of such rights in the appropriate aircraft file maintained by him and to take such other action as may be necessary to implement this provision.

**(4) The said rights shall not be recognized[52] in other Contracting States after expiration of the three months mentioned in paragraph (3) unless, within this period,**

**(a) the right has been noted on the record in conformity with paragraph (3), and**

[52] It will be noted that the phrase "admitted or" has not been included in this paragraph. The omission was intentional. The effect of it is to permit the priority claim to subsist in the Contracting State where it arose even though it has not been noted on the record of the State of the aircraft's registry. The result was based on the theory that the Convention did not establish the charge against the aircraft, but merely gave recognition to a charge created pursuant to the law of a sovereign State. In consequence of the foregoing, an unrecorded charge may exist for years against the aircraft, but it cannot displace any recorded right (other than ownership) no matter when that right is recorded. *See Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722, *p.* 145 *et seq. See Note* 58.

**(b) the amount has been agreed upon[53] or judicial action [54] on the right has been commenced. As far as judicial action is concerned, the law of the forum shall determine the contingencies upon which the three months period may be interrupted[55] or suspended.[56]**

[53] This provides for a settlement of the amount of claim through agreement of the parties.

[54] It is to be noted that the judicial action contemplated in (b) is judicial action with respect to the right and not judicial action necessarily on a personal claim against the aircraft owner. *Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722 p. 189.

[55] As used by the Legal Committee at Brussels where this language was introduced, the word "interrupted" indicates a break in the running of the three months' period after which the three-month period will be started all over again. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635 p. 59.

[56] The word "suspended", on the other hand, was used to indicate the possibility that the period would not start *de novo* but only the unexpired portion would continue to run. *See Minutes of First Session, Legal Committee, ICAO Doc.* 4635, p. 59.

**ARTICLE IV (Cont.)**

**(5) This Article shall apply notwithstanding[57] the provisions of Article I, paragraph (2).[58]**

[57] This provision was inserted in the Convention out of an abundance of caution in order to make it amply clear that the provisions of Article IV relating to privileged claims overrode the general provisions of Article I (2).

[58] Article IV, although it deals with a relatively minor aspect of the Convention, possibly received more discussion in the Legal Commission at Geneva than any other provision. Despite all these deliberations, the Article remains ambiguous in certain respects. The principal factor giving rise to this ambiguity is that it departs from the general philosophy of the Convention, as set forth in Article I (2), which is to protect recorded rights, and creates a priority in certain privileged claims as set forth in Article IV (1), in derrogation of the interests of the holders of recorded rights.

Article IV contravenes the general philosophy of the Convention and specifically the provisions of Article I (2) in three ways:

(a) It grants privileged claims a top priority;

(b) It requires other States to recognize such claims as having top priority even during the three-month period when they may not be recorded;

(c) It prohibits other Contracting States from recognizing such claims if the provisions of Article IV (4) have not been complied with.

The ambiguity relates to the effect such a claim will have in the country where it arose if it has not been recorded in the State of the aircraft's registry.

The English text is clear that the *prohibition* against recognition of unrecorded privileged claims after the three-month period has expired applies *only* to other Contracting States. The French and Spanish texts are not so clear on this point, but the legislative history indicates that the English text more properly reflects the intent of the Legal Commission. Consequently, the State where the claim arose would be at liberty to admit the claim as an encumbrance against the ownership interest in the aircraft. Would it also be able to place such a claim ahead of recorded security rights?

Since the prohibition of Article IV (4), contravenes only that part of Article I (2) which permits a State to recognize unrecorded claims, it does not affect that part of Article I (2) providing that States shall not admit or recognize unrecorded rights *as having priority* over recorded rights. Unless, therefore, some other provision of the Article permits the Contracting States where the claim arose to prefer it to recorded rights, the general prohibition of Article I (2) will prevail.

The only provision in Article IV which might have the foregoing effect is the last clause in Article IV (1) "and shall take priority over all other rights in the aircraft". It is clear that this creates a treaty priority and is not merely a recognition of priority established under local law. (ICAO Doc. 5722, pp. 185, 186.) However, there is nothing in the Article which explicitly makes this priority thus established by the Convention terminate if the conditions of Article IV (4) have not been complied with.

It is the opinion of the members of the Legal Sub-Committee of the Air Coordinating Committee that such a termination must be implied. This opinion is based on (1) the fact that a proposal to make the clause conditional on compliance with Article IV (4) was withdrawn because it was only a drafting change (ICAO Doc. 5722, p. 129); (2) the fact that an Indian proposal which would have left the entire matter of the establishment of liens and their priority over these privileged claims to national law was objected to by Mr. Justice Alten (Norway), the chief proponent of this text,

**ARTICLE IV (Cont.)**

as insufficient—"There was also another question. How long should these charges exist as (un) recorded charges? It was also necessary to have recording effected within a certain period." (ICAO Doc. 5722, p. 122.) It is also clear from an earlier proposal of Mr. Justice Alten (Norway) that he intended the priority to cease altogether if the claim were not recorded (ICAO Doc. 5722, p. 317).

These reasons are buttressed by the complete absurdity a failure to read such a condition into the Article would bring about. The priority being a treaty priority, it would apply in all countries including the country of origin of the claim, even though the latter State granted only a deferred rank to the claim (ICAO Doc. 5722, p. 185). This result is desirable for the sake of uniformity so long as the claim is to be recognized internationally, but when international recognition is cut off there would be no reason for requiring the country where the claim arose to subvert its own laws to accomplish a result prohibited to the other Contracting States and in derrogation of the basic principles of the Convention. Accordingly, it is the opinion of the members of the Legal Sub-Committee of the Air Coordinating Committee that the top priority granted these claims by the Convention will cease to exist in all countries if the conditions of Article IV (4) are not met.

This opinion leads to the following specific conclusions:

(a) That an Article IV type claim, if the conditions of Article IV (4) are met, will enjoy top priority over recorded rights in all Contracting Countries.

(b) That such a claim, if the conditions of Article IV (4) have not been met, is not to be recognized for any purpose as a lien against the aircraft in Contracting countries other than the country in which it arose.

(c) That such a claim, if the conditions of Article IV (4) have not been met, may be recognized in the country of origin of the claim as a lien against the aircraft only to the extent it does not displace other encumbrances against the aircraft.

**ARTICLE V**

**The priority of a right mentioned in Article I, paragraph (1) (d),[59] extends to all sums[60] thereby secured.[61] However, the amount of interest included shall not exceed that accrued during the three years prior to the execution proceedings[62] together with that accrued during the execution proceedings.**

[59] It will be noted that this provision relates only to mortgages, hypotheques, and other similar rights.

[60] By this language, it was intended that all costs and expenses which under the mortgage indenture are made part of the mortgage debt, would be covered by this provision. *See Report and Commentary on the Brussels Draft Convention, ICAO Doc.* 4634, *ICAO Doc.* 4635, *p.* 249, 255.

[61] By the use of the phrase "thereby secured" it was the intention of the draftsmen to include future advances.

[62] In prior drafts the phrase "prior to the execution proceedings" read "prior to the commencement of the execution proceedings". It is believed that the words "the commencement of" were inadvertently omitted and that the phrase as it now reads should be construed in that manner. This construction will enable the courts to fix with exactness the date prior to which accrued interest will not be allowed.

## ARTICLE VI

**In case of attachment or sale of an aircraft in execution, or of any right therein,[63] the Contracting States shall not be obliged to recognize,[64] as against the attaching or executing creditor or against the purchaser,[65] any right mentioned in Article I, paragraph (1), or the transfer[66] of any such right, if constituted or effected with knowledge of the sale or execution proceedings by the person against whom the proceedings are directed.[67]**

[63] In general, the Convention deals only with the recognition and protection of rights in aircraft. It makes no attempt to deal with rights in those rights—*i.e*, such as a mortgage of a leasehold interest, the assignment of a mortgage or lease, or the transfer of an option. However, in this case it was deemed desirable to protect the rights of an attaching creditor who might levy on a mortgage, or of some other right in the aircraft, held by a creditor of the aircraft owner.

[64] The purpose of this provision was to guard against the case where an aircraft belonging to a debtor is attached abroad, and the owner thereupon transfers the airplane, possibly fraudulently, to another person. In such a case, without this provision, it might be considered that the foreign court would be required to recognize the transfer and since the aircraft no longer would belong to the defendant in attachment proceedings, would be required to dismiss the attachment.

[65] "Purchaser" means purchaser at any judicial sale or sale in execution.

[66] Because, for the purpose of this provision, the scope of the Convention is widened to include rights on rights, it was necessary to make provision for a case of transfer of any such rights. In the ordinary course of events a direct right in an aircraft either exists or not, and there is no necessity to make a determination for the purpose of recognition of the right as to who the owner of the right is.

[67] It will be observed that this Article is not effective unless the transaction has been constituted or effected by the person against whom the attachment proceedings are directed.

## ARTICLE VII

**(1) The proceedings[68] of a sale of an aircraft in execution shall be determined by the law of the Contracting State where the sale takes place.**

[68] This word is sufficiently broad to include any type of execution sale conducted under, pursuant to, or by judicial authority. It is not construed as being broad enough to include a private sale under a power of sale and a trust deed. *See Draft Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722, p. 202.

**(2) The following provisions shall however be observed:[68a]**

**(a) The date and place of the sale shall be fixed at least six weeks in advance.**

[68a] This provision is regarded as self-executing and therefore will automatically override inconsistent State and Federal law when the Convention comes into effect for the United States.

**(b) The executing creditor shall supply to the Court or other competent authority[69] a certified extract[70] of the recordings concerning the aircraft. He shall give public notice of the sale at the place[71] where the aircraft is registered as to nationality, in accordance with the law there applicable, at least one month before the day fixed, and shall concurrently[72] notify by**

ARTICLE VII (Cont.)

registered letter, if possible by air mail,[73] the recorded owner and the holders of recorded rights in the aircraft and of rights noted on the record under Article IV, paragraph (3), according to their addresses as shown on the record.[74]

[69] As used in this connection the word "competent authority" is construed to mean the officer conducting the sale.

[70] It will be noted that there is no requirement that certified *copies* of the recordings be furnished to the competent authority or the court. The extent of the "extract" of the recordings would appear to be within the discretion of the executing creditor unless the extracts were so incomplete as to make the certification meaningless. Although this represents a field of ambiguity in the Convention, it is not regarded as serious, since the secured creditor is given notice by registered mail and may appear and prove his claim before the competent authority.

[71] When this provision was being discussed in the Legal Commission in Geneva, the attention of most of the delegates was directed to notice by publication rather than notice by posting. However, if the law of the place where the aircraft is registered as to nationality provides that public notice may be given by posting on a bulletin board, that should be sufficient. In this connection it may be advisable to consider legislation detailing the manner in which a notice under this Convention should be published.

[72] This requirement would be fulfilled, it is believed, by mailing a registered letter at the same time the notice is published.

[73] This provision was inserted at the request of the Australian Delegate, who stated that the ordinary mail took up to three weeks to reach Australia by surface from most other places. The phrase does introduce an element of doubt into the procedure since there will always be a question as to whether or not it was possible to send a registered letter by air mail to the recorded owner and the holders of the recorded rights in aircraft. In order to be on the safe side, it would seem advisable to mail two letters to each person, one by ordinary registered mail and the other by registered air mail.

[74] It should be noted that both holders of rights in aircraft under Article I and those holders of priority rights which have been noted on the record under Article IV (3) must be notified by registered mail. There is, however, no obligation to notify those salvors or other persons entitled to priority rights under Article IV who have not noted their rights on the record. This fact in conjunction with Article VIII, which effects a "purge" of all rights in the aircraft, may operate to deprive a salvor of his right. However, it is believed that the provision is not too onerous since the salvor may protect himself by noting his claim on the record immediately after the salvage incident.

(3) The consequences of failure to observe the requirements of paragraph (2) shall be as provided by the law of the Contracting State where the sale takes place.[75] However, any sale taking place in contravention of the requirements of that paragraph may[76] be annulled[77] upon demand made within six months from the date of the sale by any person suffering damage[78] as the result of such contravention.

[75] The effectiveness of this provision is somewhat diminished by the second sentence of the paragraph. It is evident that whatever are the consequences provided by the law of a Contracting State where the sale takes place, the sale may nevertheless be annulled. In the development of this provision the main dispute in the Legal Commission of the Second Assembly concerned the question as to whether a person suffering damage as a result of

**ARTICLE VII (Cont.)**

non-compliance with provisions of Article VII (2) would be entitled to have the sale avoided, irrespective of whether the national law of the Contracting State concerned provided a sanction for such non-compliance. In most countries, undoubtedly, such a sale would be set aside in the case of non-compliance with the formalities. However, certain countries could provide that a fine be paid to the State, or that the person suffering damage would be entitled to obtain money damages, or be reimbursed by the State. When the matter was first discussed in the Legal Commission at Geneva, a proposal that only in the case where the national law contained no such sanction would the right to avoid the sale be appropriate. A counter-proposal was made by the Portuguese delegation that even if the law of a Contracting State provided for a sanction, annullment of the sale could always be requested where a prejudice had been caused. In presenting the matter to be voted on the Chairman stated that a vote for the first proposal would be considered a vote against the second. The first proposal was adopted by a vote of 18 for and 2 against.

As a result of this vote the Drafting Committee submitted a text reading as follows:

> "3. The consequences of failure to observe the requirements of paragraph (2) shall be as provided by the law of the Contracting State where the sale takes place.
>
> *If the law of the Contracting State where the sale takes place contains no sanction for non-compliance with paragraph* (2), any sale taking place in contravention of the regulation laid down in that paragraph may be annulled upon demand made within six months from the date of the sale by any person suffering damage as the result of such non-compliance."

When this draft was presented to the Legal Commission on the second reading of the text, Mr. Justice Alten, the Chairman of the Drafting Committee, moved that the first part of the second paragraph be eliminated down to the words beginning with "any sale taking place." The motion was objected to by the Indian delegate on the ground that it affected a question of substance. The Chairman then put the question to a vote stating that the meeting would be implicitly taking a decision on the question of whether it was a question of procedure or of substance. If the question were one of substance, it would then require a further two-thirds vote to reopen the debate. The Commission thereupon decided to consider the proposal of Mr. Justice Alten which was thereafter adopted by vote. *Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722, p. 200, 201.

[76] This language indicates that the judge would have a certain amount of discretion as to whether the sale should be avoided, even though the person making the demand has done so within six months and has suffered damages as a result of the non-compliance with the sale provisions of Article VII (3). However, it is believed that the legislative history in the Legal Commission at the Second Assembly indicates that the application may be made and the sale avoided as a matter of right, if the person suffers damage as a result of the contravention.

[77] It is believed that when the sale is annulled, it would have the effect of making the transaction void *ab initio* with the probable result the aircraft could be recovered even from a *bona fide* transferee of the purchaser at the judicial sale.

[78] It should be noted that not only must the plaintiff in a suit to set aside a judicial sale pursuant to the provisions of this paragraph show actual damage, but he must show that such damage was the direct and proximate result of the failure of the attaching creditor to carry out the provisions of Article VII (2).

ARTICLE VII (Cont.)

(4) No sale in execution can be effected unless all rights[79] having priority[80] over the claim[81] of the executing creditor in accordance with this Convention which are established[82] before the competent authority, are covered[83] by the proceeds of sale or assumed by the purchaser.

[79] This provision is the so-called "minimum bid" provision. The purpose of the Article is to prevent a sale at the behest of a junior lienor unless the proceeds of the sale would be sufficient to pay off all senior liens and rights or unless the sale is made subject to such prior liens and rights. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635, p. 112.

[80] This would obviously include not only prior rights of the type set forth in Article I but also all rights under Article IV including those not recorded.

[81] The word "claim" was used here to cover not only a right of the nature dealt with in the Convention but also an unsecured debt of any nature for which the aircraft has been attached.

[82] Under Article 7 (2) (b) the executing creditor is obliged to supply to the Court or other competent authority a certified extract of the recordings concerning the aircraft. Whether such a filing will constitute a sufficient establishment of the claim for the purpose of this paragraph is open to question.

[83] All amounts secured by the mortgage or other interest in the aircraft must be covered by the proceeds of sale. In the case of a fleet mortgage where each aircraft in the fleet constitutes security for the entire debt, a a sale price to the full extent of the debt would be required.

(5)[84] When injury[85] or damage is caused to persons or property on the surface[86] of the Contracting State where the execution sale takes place, by any aircraft subject to any right referred to in Article I held as security for an indebtedness,[87] unless adequate and effective insurance by a State[88] or an insurance undertaking in any State has been provided by or on behalf of the operator[89] to cover such injury or damage, the national law of such Contracting State may provide in case of the seizure of such aircraft or any other aircraft owned by the same person and encumbered with any similar right held by the same creditor:[90]

[84] This paragraph represents the biggest compromise of the Convention between the viewpoint of the United States on the one hand, and the foreign countries on the other. In effect, it provides for a conditional recognition of the fleet mortgage to the full extent of the mortgage debt. The condition under which the fleet mortgage will not be recognized except in a prorated amount is when suit is brought by a person who has been physically injured or where property has been damaged by the flight operations of the debtor airline, and who thus becomes an involuntary creditor of the airline. Even then, however, the condition will not operate unless no adequate insurance covering the risk to third persons on the surface is carried.

[85] Injury includes death.

[86] Would not include the operator of or passengers in another airplane in flight. Presumably, however, would cover damage to other aircraft and its passengers in its process of taking off.

[87] This provision was developed at Brussels during the First Session of the Legal Committee. It was the intention of the draftsmen there to cover all security devices, including the retention of title as a security device. This would envisage the attachment of an aircraft operated by the borrower under an equipment trust or hire purchase agreement with the security title

ARTICLE VII (Cont.)

in the lender. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635, *p.* 105, *et seq.*

[88] The purpose of this provision is to permit a State to guarantee the possible tort claim against airlines operated by the State, without the necessity for taking out insurance. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635, *p.* 168. Other self insurance for risks to third persons, however, would not appear to be contemplated by the Convention.

[89] The phrase "by or on behalf of the operator" is not designed to preclude the taking out of insurance by the secured creditor in case he so desires to cover the particular risks. It was, however, designed to indicate that insurance taken out by property owners on their own houses and other property was not to be considered sufficient to meet this proviso. *See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc.* 5722 p. 207.

[90] There must be a "fleet" relationship between the operator of the aircraft and the secured creditor. This means not only the usual type of "fleet mortgage", but it would also cover a situation where several aircraft are purchased from the same source at different times under similar but separate financing agreements.

**(a) that the provisions of paragraph (4) above shall have no effect[91] with regard to the person suffering such injury or damage or his representative if he is an executing creditor;**

[91] In the event that insurance is not carried, it will be noted that no minimum bid requirement will be effective on the sale of a fleet mortgage aircraft.

**(b) that any right referred to in Article I held as security for an indebtedness encumbering the aircraft may not be set up against any person suffering such injury or damage or his representative in excess of an amount equal to 80%[92] of the sale price.[93]**

[92] The figure of 80 per cent was chosen at the First Session of the Legal Committee in Brussels for the reason that in general the prorated share which each aircraft bears in a fleet of the mortgage debt rarely exceeds 80 per cent of the value of the aircraft. Thus the holder of the mortgage would be substantially protected, even though the additional protection accorded by the joint nature of the liability would not accrue to his benefit. On the other hand, it does permit a certain equity to be attached by the injured person. *See Minutes Legal Committee, 1st Session ICAO Doc.* 4635 *pp.* 97, 167, *et seq.*

[93] Since the mortgage may be set up to the extent of 80 per cent of the sale price, it is apparent that any claims of priority creditors under Article IV and for costs of the suit must be paid out of the remaining 20 per cent.

**In the absence of other[94] limit established by the law of the Contracting State where the execution sale takes place, the insurance shall be considered adequate[95] within the meaning of the present paragraph if the amount of the insurance corresponds[96] to the value[97] when new of the aircraft seized[98] in execution.**

[94] This provision permits Contracting States to establish other limits, either higher or lower for insurance for third party liability on the surface. Consequently, it does not prejudice a country in any way in its consideration of limitations of liability for such type of damage. Presumably a limit imposed for the purpose of this provision would be the same or consistent with limitations of liability generally for aircraft damage to the surface, although such is not required by the Convention.

**ARTICLE VII (Cont.)**

[95] This provision goes only to the adequacy of the insurance and not to its effectiveness.

[96] This word permits the insurance to be made payable in any type currency so long as it is the equivalent of the aircraft when new.

[97] It was the intention of the draftsmen at Brussels in inserting this clause to bring the greatest certainty possible to the transaction so that lenders could determine in advance exactly what amount of insurance must be maintained. Since it is customary at the present time for airlines to carry insurance far in excess of the value of individual aircraft when new, it is not believed that this requirement should cause any trouble.

[98] It will be noted that the amount of the insurance must correspond to the value when new to the particular aircraft which has been attached and not the aircraft causing the damage (unless that aircraft is the one that is attached). In a fleet mortgage it is obviously not necessary that the insurance correspond to the value of the fleet.

**(6) Costs legally chargeable under the law of the Contracting State where the sale takes place, which are incurred in the common[99] interest of creditors in the course of execution proceedings leading to sale,[100] shall be paid out of the proceeds[101] of sale before any claims, including those given preference by Article IV.**

[99] Since by Article VIII all secured interests in the aircraft are purged through the judicial sale, the sale must be legally held to be in the common interest of all secured creditors and of the attaching creditor if he is not a secured creditor. This will be true even if one or more of the secured creditors have attempted to contest the sale. However, it will be noted that only those costs which are in the common interest of all leading to the sale are permitted to come ahead here.

[100] If no sale takes place, obviously there will be no costs allowed against the aircraft.

[101] It was suggested during the course of the development of this Convention that the costs should be payable by the purchaser in addition to the price. However, this idea was rejected because it would be impossible to ascertain the exact amount that the purchaser would have to pay at the time his bid was made.

**ARTICLE VIII**

**Sale of an aircraft in execution in conformity with the provisions of Article VII shall effect the transfer of the property[102] in such aircraft free from all rights which are not assumed by the purchaser.**

[102] This provision incorporates the doctrine of the civil law known as the "purge." As will be seen it provides that judicial sale shall have the effect of transferring the ownership in the aircraft free and clear of all encumbrances or other liens, unless assumed by the purchaser. These, of course, would include the priority rights under Article IV as well as rights under Article I. It does not, however, extinguish the claim in personam against the debtor. *See Minutes Legal Committee, 1st Session, ICAO Doc.* 4635, *p.* 110, *et seq.*

**ARTICLE IX**

**Except in the case of a sale in execution in conformity with the provisions of Article VII, no transfer of an aircraft from the nationality register or the record[103] of a Contracting State to that of another Contracting State[104] shall be made, unless all holders of recorded[105] rights have been satisfied[106] or consent to the transfer.**

**ARTICLE IX (Cont.)**

[103] This Article stems from a suggestion made by Brigadier Wilberforce of the United Kingdom during the consideration of this matter in Commission IV at the First Assembly of ICAO held in 1947. The language was adopted for the main part on the floor at the First Session of the Legal Committee held in September of 1947. The primary concept of the Article is to prevent the transfer of registration as to nationality from one Contracting State to another without securing the consent of all recorded creditors. If their claims have been satisfied, that fact may be shown and the transfer permitted.

[104] During the Legal Commission meetings at Geneva, the United States Delegation strongly urged that this prohibition extend not only to transfers to other Contracting States but transfers to non-contracting States as well. This was defeated. *Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722, *p.* 218. As a result it may be possible to circumvent this provision by a transfer to a non-contracting State free of lien and thereafter a transfer from the non-contracting State to the desired Contracting State.

[105] It will be noted that the only obligation is to holders of *recorded* rights. Since the holder of a priority right under Article IV does not have a recorded right, it would appear that he would neither have to be satisfied nor consent to the transfer.

[106] "Satisfied" would include not only payment but a quit-claim or general release.

**ARTICLE X**

**(1) If a recorded right in an aircraft[107] of the nature specified in Article I, and held as security for the payment of an indebtedness, extends,[108] in conformity[109] with the law of the Contracting State where the aircraft is registered to spare parts[110] stored in a specified[111] place or places, such right shall be recognized by all Contracting States, as long as[112] the spare parts remain in the place or places specified, provided that an appropriate[113] public notice, specifying the description of the right, the name and address of the holder of this right and the record in which such right is recorded, is exhibited at the place where the spare parts are located, so as to give due notification to third parties that such spare parts are encumbered.[114]**

[107] This Article provides for a limited coverage of spare parts in connection with a financing transaction. It will be noted at the outset that the provision does not apply to spare parts in general but only those which are covered by a mortgage or other encumbrance in connection with the financing of an aircraft. *Minutes, Legal Commission, 2nd Assembly, ICAO Doc.* 5722, *pp.* 93-94.

[108] Accordingly, it is the recorded right in the aircraft which must extend to cover spare parts.

[109] It was the intention of the draftsmen of the Convention by the use of the words "in conformity with" to permit local law to control as to coverage of spare parts. *See ICAO Doc.* 4601, *p.* 6—*LC/37—3/9/47.*

[110] See Definition set forth in Article X(4). This would not include an engine or other part of an aircraft which is temporarily removed from the airplane for the purpose of repairs or for other reasons. Such an engine or part would be considered a part of the airplane under definition of aircraft in Article XVI.

[111] Specified in the mortgage indenture.

[112] The French and Spanish texts of the Convention read "upon condition that" instead of "as long as" in this particular place. However, the legisla-

**ARTICLE X (Cont.)**

tive history would indicate that the intention was the same as the English. *See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, p. 220, et seq.*

[113] The word "due" is really redundant in view of the fact that the word "appropriate" has been inserted above. However, during the drafting and formulation of this provision the "due" was inserted at the insistence of the French Delegation in Montreal in 1947. Subsequently, in Brussels at the First Session of the Legal Committee, the word "appropriate" was included at the request of the Canadian delegate. *See Minutes Legal Committee, 1st Session, ICAO Doc. 4635, p. 169.*

[114] Since the right must be described in the public notice, it would appear that nothing further need be stated in the notice to indicate that the spare parts are encumbered.

**(2) A statement indicating the character and the approximate number[115] of such spare parts shall be annexed to or included in the recorded document. Such parts may be replaced by similar parts without affecting the right of the creditor.[116]**

[115] Since the spare part coverage is of a relatively limited nature, and was intended to cover only those spare parts procured on the original financing of an aircraft (or their replacements), it will be possible to indicate the character and the approximate number of such parts. The United States Delegation opposed the inclusion of this provision throughout, but the other delegates insisted on its retention for the purpose of indicating the type of spare parts designed to be covered. This, however, is not a requirement that the character and approximate number of the spare parts be detailed as to each place, but only as to the aggregate number of spare parts and their character contained in the financing. *See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 119, et seq.*

[116] This last sentence permits the interchange of the parts and their replacement by other parts. Again, this relates to the parts in the aggregate and not the parts at any specific place.

**(3) The provisions of Article VII, paragraphs (1) and (4), and of Article VIII shall apply to a sale of spare parts in execution. However, where the executing creditor is an unsecured[117] creditor, paragraph 4 of Article VII in its application to such a sale shall be construed so as to permit the sale to take place if a bid is received in an amount not less than two-thirds of the value of the spare parts as determined by experts appointed by the authority responsible for the sale. Further in the distribution of the proceeds of sale, the competent authority may, in order to provide for the claim of the executing creditor,[118] limit the amount payable to holders of prior rights to two-thirds of such proceeds of sale after payment of the costs referred to in Article VII, paragraph (6).**

[117] The limitation that the executing creditor must be an unsecured creditor was inserted to prevent a junior lienor from taking advantage of this provision in order to obtain some payment out of the mortgaged parts at the expense of a senior lienor. The entire clause was intended only for the benefit of the local unsecured creditors who might do business with the airline or might be insured by it. *Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, p. 95.*

[118] It is believed that "executing creditor" as used herein would include a trustee in bankruptcy. It is doubtful, however, whether the secured creditor could file his claim as a general creditor to participate in the one-third reserved for the executing creditors.

**ARTICLE X (Cont.)**

**(4) For the purpose of this Article the term "spare parts" means parts of aircraft, engines, propellers, radio apparatus, instruments, appliances, furnishings, parts of any of the foregoing, and generally any other articles of whatever description maintained for installation in aircraft in substitution for parts or articles removed.[119]**

[119] As indicated above the term "spare parts" would not include any part of an aircraft which is temporarily removed from the aircraft for purposes of repairs where that part is to be replaced on the airplane immediately.

**ARTICLE XI**

**(1) The provisions of this Convention shall in each Contracting State apply to all[120] aircraft registered as to nationality in another Contracting State.**

[120] Despite the all-inclusive nature of this sentence, it must obviously be read in connection with Article XIII. It should also be noted that in this Article the French and Spanish texts are stated in a negative manner whereas the English text is in the positive. It was the opinion of the Committee that this diversity in language in no way affected substance.

**(2) Each Contracting State shall also apply to aircraft there registered as to nationality:**

**(a) The provisions of Articles II,[121] III,[122] IX,[123] and**

[121] Recordings must appear in same record.

[122] Listing of address of authority on certificate of registration as to nationality, furnishing of copies, manner in which recording system must be maintained and opportunities for making reasonable charges.

[123] Provision prohibiting transfer from nationality register unless creditors consent or are satisfied.

**(b) The provisions of Article IV, unless the salvage or preservation operations have been terminated within its own territory.[124]**

[124] This exception is not to be regarded as prohibitory. If the Contracting State desires to have salvage and preservation operations enjoy a priority status domestically, it is possible for that State so to provide notwithstanding this provision. Its purpose was only to exempt the State from a mandatory requirement that Article IV should be applied to its own aircraft involving salvage or preservation operations occurring within its own territory. *See Minutes Legal Committee, 1st Session, ICAO Doc.* 4635, *p.* 170.

**ARTICLE XII**

**Nothing in this Convention shall prejudice the right of an Contracting State to enforce against an aircraft its national laws relating to immigration,[125] customs[126] or air navigation.[127]**

[125] This Article was inserted to make it amply clear that nothing in the Convention was intended to deprive the State of its police power in the enforcement of its immigration, customs or air navigation laws. *See ICAO Doc.* 5722, *pp.* 154, 155

[126] At Geneva the word "customs" was substituted for the word "smuggling," which appeared in Brussels draft of the Convention. This change probably expanded the term to include violation of formal requirements as well. *See ICAO Doc.* 5722, *pp.* 136, 154, 155.

[127] This preserves the right of a State to impose a first lien on an aircraft for violation of its air traffic rules and other air navigation laws.

## ARTICLE XIII

**This Convention shall not apply to aircraft used in military, customs or police services.[128]**

[128] See footnote [120].

## ARTICLE XIV

**For the purpose of this Convention, the competent judicial and administrative authorities of the Contracting States may, subject to any contrary provision in their national law, correspond directly with each other.[129]**

[129] This Article is of questionable utility in view of the restriction which subjects it to contrary national laws.

## ARTICLE XV

**The Contracting States shall take such measures as are necessary for the fulfilment of the provisions of this Convention[130] and shall forthwith inform the Secretary General of the International Civil Aviation Organization of these measures.[131]**

[130] Under the laws of most countries, treaties are not self-executing instruments. As a result it was believed necessary to put in a provision requiring such States to place implementing provisions in their substantive law. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635, *p.* 140, *et seq.* Furthermore, even in countries with systems such as those of the United States, where self-executory treaties become the supreme law of the land, certain parts of the treaty which are non self-executing must be implemented.

[131] In the development of this provision, there was once a requirement that the Secretary-General would advise all the Contracting States under this Convention. This was regarded, however, as being a limitation clause, since the Secretary-General in due course under the Chicago Convention would notify all Contracting States under that Convention. *See Minutes, Legal Committee, 1st Session, ICAO Doc.* 4635, *p.* 140.

## ARTICLE XVI

**For the purposes of this Convention the term "aircraft" shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.[132]**

[132] Attention has already been drawn to the difference between the definition of spare parts and this definition of aircraft. It should also be noted in this connection that the definition contained in the Convention goes beyond the definition contained in the Civil Aeronautics Act. For international purposes the aircraft includes everything attached to the airframe and not merely the airframe itself.

## ARTICLE XVII

**If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible,[133] references in this Convention to the law of the Contracting State shall be construed as references to the law of that territory.**

[133] It should be noted that this clause relates only to cases where separate registers for the purpose of nationality are maintained and not where separate records are maintained.

ARTICLE XVIII

This Convention shall remain open for signature until it comes into force in accordance with the provisions of Article XX.[134]

[134] As of December 1, 1948, the following countries had signed the Convention: Argentina, Belgium, Brazil, China, Colombia, France, Iceland, Ireland, Italy, Mexico, Netherlands, Peru, Portugal, United Kingdom, United States, Venezuela, Dominican Republic, Switzerland, Greece, Chile, Denmark, Norway, and Sweden.

ARTICLE XIX

(1) This Convention shall be subject to ratification by the signatory States.

(2) The instruments of ratification shall be deposited in the archives of the International Civil Aviation Organization,[135] which shall give notice of the date of deposit to each of the signatory and adhering States.

[135] While making an international organization the depository of the Convention is a departure from traditional practice, it is believed that this is desirable in this case.

ARTICLE XX

(1) As soon as two[136] of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the second instrument of ratification. It shall come into force, for each State which deposits its instrument of ratification after that date, on the ninetieth day after the deposit of its instrument of ratification.

[136] Although it is not usual to have a multilateral convention enter into effect when only two of the signatory States have ratified, it appeared desirable in this instance to bring it into force immediately with respect to two States, since the obligations under the Convention may be amply fulfilled by two States with respect to each other.

(2) The International Civil Aviation Organization shall give notice to each signatory State of the date on which this Convention comes into force.

(3) As soon as this Convention comes into force, it shall be registered[137] with the United Nations by the Secretary General of the International Civil Aviation Organization.

[137] This is required by Article 102 of the United Nations Charter.

ARTICLE XXI

(1) This Convention shall, after it has come into force, be open for adherence by non-signatory States.

(2) Adherence shall be effected by the deposit of an instrument of adherence in the archives of the International Civil Aviation Organization, which shall give notice of the date of the deposit to each signatory and adhering State.

(3) Adherence shall take effect as from the ninetieth day after the date of the deposit of the instrument of adherence in the archives of the International Civil Aviation Organization.

ARTICLE XXII

(1) Any Contracting State may denounce this Convention by notification of denunciation to the International Civil Aviation Organization, which shall give notice of the date of receipt of such notification to each signatory and adhering State.

(2) Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

ARTICLE XXIII

(1) Any State may at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Convention does not apply to any one or more of the territories for the foreign relations of which[138] such State is responsible.[139]

[138] The expression "territories for the foreign relations of which such state is responsible" has been developed to express in a few words the extent of territorial application that had been included in the ever-expanding wording previously used in the provisions relating to territorial application. Previously, expressions such as "colonies, protectorates, mandated territories or any territory subject to its sovereignty or authority, or any territory under its suzerainty or trusteeship" or "colonies, protectorates, territories in respect of which it exercises a mandate or trusteeship, territories under its suzerainty, and other non-metropolitan territories subject to its sovereignty or authority", were used. Such provisions had become cumbersome and with the addition of new terms were increasingly cumbersome. Phraseology similar in substance to that used in Article XXIII is contained in a number of recent international agreements.

[139] This provision permits a Contracting State to exempt the application of the Convention to its territories if it should so desire.

(2) The International Civil Aviation Organization shall give notice of any such declaration to each signatory and adhering State.

(3) With the exception of territories in respect of which a declaration has been made in accordance with paragraph (1) of this Article, this Convention shall apply to all territories for the foreign relations of which a Contracting State is responsible.[140]

[140] This provision should be read in conjunction with Article XXIII (1).

(4) Any State may adhere to this Convention separately on behalf of all or any of the territories regarding which it has made a declaration in accordance with paragraph (1) of this Article and the provisions of paragraphs (2) and (3) of Article XXI shall apply to such adherence.

(5) Any Contracting State may denounce this Convention, in accordance with the provisions of Article XXII, separately for all or any of the territories for the foreign relations of which such State is responsible.

# FEDERAL

Department Editor: Walter H. Wager*

## 1948 ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD TO THE CONGRESS—SELECTED EXCERPTS.

### INTRODUCTION

DURING the year summarized by this report, United States civil aviation, although continuing to expand and to develop, was faced with increasingly complex problems involving the financial and competitive position of the industry. Airline earnings during the fiscal year 1948, although somewhat improved over the preceding year, were nevertheless unsatisfactory. It is now apparent that the difficulties facing civil aviation are larger than those which can reasonably be ascribed simply to postwar adjustment.

The major task facing the carriers and the Civil Aeronautics Board in the year just past and the year ahead is the development of policies which will return the industry to a sound economic and financial basis and at the same time will foster the continued growth of civil aviation. Both objectives must be met at a reasonable cost to the Government. The carriers are clearly incapable of continuing their operations in the face of heavy losses. On the other hand, the requirements of the postal service, the foreign and domestic commerce, and particularly the national defense, dictate the continued growth and improvement of the air transportation system. The dictates of economy and simple good sense require that the existing system and future expansion be as nearly self-supporting as possible. Cases involving policy questions of this kind which were presented to the Board during the year just past are typified by the *Air Freight Case*, the *Freight Forwarder Case*, numerous mail rate proceedings, and various cases arising out of the operations of large irregular carriers. Each of these is discussed in detail in this report.

Although the safety record of the carriers in fiscal 1948 was substantially improved over that of the preceding year, the fact that it has been necessary to ground three of the four new postwar transport aircraft for varying periods of time, on a compulsory or voluntary basis, has made more difficult the economic problems confronting the industry and the Board.

*Mail rates*

Of fundamental importance, not only during the past year but also for the future, are the problems relative to Government support of the air transport industry through mail pay. The Board during the year just past has made progress with respect to the revision and reestablishment of final mail rates for various carriers, necessitated by increasing costs and the cessation of abnormal wartime load factors.

In March of this year the Board issued a revised "service" rate for the five largest carriers in the industry. This rate represented a substantial increase over the previously prevailing rate, but was not designed to contain any element of subsidy. Although planned by the Board as a new final "service" rate, the five carriers concerned excepted to the rate and it was accordingly established as a temporary rate. The reexamination of the adequacy of this rate and the establishment of either this or other rates as final rates for these carriers will be one of the major problems facing the

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Board over the next few months. The importance of the rate arises in part from the fact that these carriers represent, in terms of the total air transportation performed, approximately 80 percent of the domestic industry, and in part from the importance of the concept of the "service" rate as opposed to the "need" rate.

The Board's staff which has been assigned to work on the "Big Five" service rate case is exploring at the same time, for the benefit of certain Congressional committees, the feasibility of, and problems involved in, separating the subsidy elements of the mail rate from the cost of service elements. The completion of this study and the fixing of final mail rates for these five carriers represents one of the top priority matters now pending before the Board.

With respect to other mail rates, reasonable progress has been made with an admittedly insufficient staff in putting other domestic and international carriers on revised final rates of mail pay. Of the 11 domestic trunk carriers other than the Big Five, four are now on recently established final "need" rates. The calculation of "need" rates for four other carriers is at a sufficiently advanced stage so that they should be issued by, or soon after, the first of the year. By that time the three remaining domestic trunk carriers will have received increased temporary rates. In addition, the Board anticipates that the first of the year will see five feeder-line carriers on final rates, and it is expected that the balance of the feeder carriers will be on temporary rates which will closely approximate the final rates to which they will be entitled. Work on the establishment of final international mail rates is at a sufficiently advanced stage so that it is anticipated that approximately four will be issued during the first part of the coming year.

*Freight rates and passenger fares*

The problems of mail pay and the various studies being conducted by the Board in connection with mail rates are closely related to the passenger fare and freight rate structures and levels now in effect. In the late fall and early winter of 1947 the carriers in general instituted a second postwar fare increase. Believing that the level of the carriers' passenger fare structure still had not risen at a rate which approximated the rate of increase in the carriers' costs, and that this lag in fares was in part responsible for the increasing dependence of the carriers on the Government for mail pay, the Board on August 19, 1948, called a conference of the 16 domestic carriers and proposed further increases in passenger fares. As a result of this conference, there has been a general tendency in the industry to revise passenger fares upward while at the same time instituting promotional tariffs, which were also suggested by the Board at the August 19 meeting, to utilize existing unused capacity. The fare situation is by no means stabilized and will be closely scrutinized by the Board, since the importance of adequate fare levels is of particular importance in this industry where losses tend to fall on the Government through mail pay support.

The situation with respect to freight rates, which was discussed in our last Annual Report, was somewhat clarified by the issuance by the Board, in May 1948, of its opinion and order in the *Air Freight Rate Investigation.* This order established a minimum freight rate of 16 cents a ton-mile for all shipments involving transportation up to 1,000 ton-miles, and 13 cents for all transportation above 1,000 ton-miles. Subsequently the carriers were permitted to put into effect certain special tariffs designed to meet the unbalance between eastbound-westbound traffic movements. In establishing these minimum rates, the Board warned that they were not to be regarded as the basis upon which to set the general freight rate level. Despite this warning, there was a noticeable tendency as the summer progressed, toward

increasingly lower commodity rates. Accordingly, in October 1948 the Board suspended the tariffs of certain carriers and instituted a new investigation as to the general level of freight rates.

*Economy and efficiency*

A third, and virtually inseparable, problem connected with mail pay and passenger fares is the managerial economy and efficiency of airline operations including the volume of service which they offer. The carriers' reports, which are filed with the Board, disclose a trend toward declining load factors and indicate that the question of excess capacity is becoming of increasing importance. Plans and equipment programs laid immediately following the war and based on the generally favorable outlook for airline traffic are currently resulting in the installation of large quantities of larger and faster equipment which far exceed the capacity of older aircraft. It would be unwise and unwarranted to insist upon the maintenance of load factors comparable to those achieved during the war period. At the same time, neither the carriers nor the Government can long support the operation of capacity which is far in excess of a stable, or slightly diminishing, volume of traffic. The control of excess capacity will constitute a major problem for both the carriers and the Board in the year ahead.

The Board believes that during the past year the carriers have made notable progress in the elimination of unnecessary expense and service. Nevertheless, there appears to be still more which can be accomplished in this direction, particularly along the lines of eliminating duplicating facilities. Certain carriers have progressed much further in this direction than others and have amply demonstrated the economies and improved service obtainable through reasonable consolidation of ground facilities. The coming year should see more progress in this field.

*The route pattern*

Since the end of the war the route pattern, both domestic and international, has grown substantially. Changes in the type of equipment employed, the leveling off of passenger traffic, and the process of route consolidations make it appear that certain alterations and modifications of the existing route pattern are required. In the spring of 1948 the Board directed its staff to prepare a comprehensive and complete analysis of the domestic route pattern. This study, upon its completion in the early months of 1949, will assist in forming a more nearly adequate basis for future improvements.

*Feeder carriers*

Of the 21 feeder and local airlines[1] which have been awarded routes since the close of the war, 11 are now in operation. These carriers have been certificated for 3 years in order to provide an experimental period during which the value (and cost) of their services may be tested. In the *Additional Service to Florida* case (decided September 1, 1948) the Board declined to renew Florida's certificate beyond its expiration date of March 28, 1949. The Board noted that the cost to the Government through mail pay of Florida's service was excessive, despite the commendable efforts of Florida's management to reduce costs and to increase traffic. The Board concluded that the feeder experiment conducted in this particular region of the country was not successful and should not be continued.

The certificates of other feeder carriers expire at various dates, beginning with September 12, 1949. In the case of certain carriers, operations have been conducted for so short a time, because of inability to commence service immediately upon the issuance of the certificate, that the Board will consider the extension of the life of the certificates for 1 year or what-

[1] Not including 3 helicopter and pick-up mail carriers.

ever period of time is necessary to assure a reasonable experiment.[2] The Board has directed its staff, in connection with the appraisal of the domestic route pattern mentioned above, to make a study and recommendations as to each feeder carrier which has operated for a reasonable period of time. Approximately a year prior to the expiration date of the carrier's certificate these studies and recommendations will form the basis of a show-cause order addressed to specific carriers for the purpose of determining whether the public convenience and necessity require the renewal, extension, modification, or possibly elimination of the temporary route structures.

In considering whether the certificate of a feeder carrier should be extended, the Board will take into consideration such items as the need of the communities for air service because of isolation, poor ground transportation, or other reasons, the public acceptance and use of the service, the cost to the Government of the service, and the feasibility of providing comparable service by trunk-line carriers. Each carrier, other interested carriers, and each community involved will be given an opportunity to be heard before the Board reaches its decision.

*Air freight*

The growth of air freight since the termination of the war has been extremely rapid. This class of traffic was the only one which showed a continued rate of growth during the year just past and which promises further growth for the future. In fiscal 1948 the estimated volume of air freight (excluding freight transported by the large irregular carriers, which was estimated, on the basis of incomplete data, at 25 million ton-miles) was 102.5 million ton-miles. Of this volume 53 million ton-miles were transported by the certificated trunk-line carriers and 49.5 million ton-miles were transported by the noncertificated all-cargo carriers. In September 1948 the Board, in its opinion in the *Freight Forwarder Case*, provided an exemption for approximately 58 domestic forwarders to engage in air-freight-forwarding activities under letters of registration. In the belief of a majority of the Board, freight-forwarder activities will be beneficial in developing substantial new areas of potential air cargo, and the exemption provided the forwarders will permit a more rapid growth of this industry than could be expected if solicitation of air freight business were left entirely in the hands of the direct air carriers.

The Board also had before it during the past year the *Air Freight Case*, in which certain all-cargo carriers are seeking certificates of public convenience and necessity in order to conduct a certificated all-cargo business. In May 1947 these carriers were provided with a special exemption which has the effect of allowing them to continue their operations on a common-carrier basis pending the decision in the *Air Freight Case*. On October 20, 1948, the Board reopened the record in the case in order to receive the latest and most complete data as to the financial and freight traffic experience, not only of the all-cargo carriers but also of the trunk-line carriers. The Board has provided for the expedited handling of the reopened case and it is expected that a decision in this case can be reached by the first of the year or shortly thereafter.

The Board recognizes that the further development of the air freight business, with a concomitant fleet of large cargo-transport aircraft which would constitute a reserve for strategic air movements, is of extreme importance, not only to the domestic and international commerce of the United States, but particularly to the national defense.

[2] On November 12, 1948, the Board extended the certificate of Challenger Airlines until March 31, 1950, in order to allow it to operate for a 3-year period.

*Irregular carriers*

At the close of the war the availability of a large number of surplus transport aircraft of the C-47 and C-54 type, plus the large number of former military personnel who had extensive air transport experience, led to the establishment of numerous new air carrier ventures. By promulgation of section 292.1 of its Economic Regulations, the Board in 1947 granted an exemption to the so-called large irregular carriers to conduct nonscheduled irregular operations for passengers or property domestically and for property only abroad. The basis and intent of this regulation was that these carriers would provide needed air services auxiliary to those furnished by the certificated scheduled carriers and would serve an economic function similar to that of the tramp steamer in ocean shipping. Events and developments subsequent to the issuance of this regulation have demonstrated that the economic opportunities for irregular operations are limited. The result has been that many of these large irregular carriers have suffered extensive financial reverses. Others, in an attempt to survive economically, have gone far beyond the letter and spirit of section 292.1, and have engaged in what is in fact a scheduled service, in competition with the certificated carriers. The operations of many of these carriers appear to be illegal. Most of these operations have been confined to a limited number of areas in which there is a heavy flow of traffic, such as Puerto Rico to the United States, transcontinental, northwest to Alaska, etc. The charges and the general level of service which these carriers offer are substantially below those usually furnished by the certificated trunk-line carriers, and the service is frequently referred to as "coach-type" service.

In the spring and summer of 1948 the Board launched a vigorous enforcement program against those irregular carriers which appeared to be wilfully and flagrantly violating the exemption provided for them. (This group constitutes 25 or 30 out of a total of 110 large irregular carriers.) The Board also directed its staff to prepare a revised edition of its regulation which would provide clarification of the operating rights of the large irregular carriers.

If a substantial volume of "coach" traffic could be economically developed it would mean the addition of a substantial volume of equipment and trained personnel to the civil air transport system which would provide an important backlog for national defense purposes. The Board will attempt to determine whether the development of "coach-type" service is required by the public convenience and necessity.

*Other problems*

Progress was also made by the Board in areas other than those outlined above. With respect to the Alaskan carriers, the program initiated in 1947 of placing all Alaskan carriers under two classifications, either pilot-owner or certificated carrier, was carried forward. The result has been, and will be, a gradual rationalization of the air transportation pattern in Alaska, making for better regulation which at the same time will prove less of a burden to the carriers. In the fall of 1948 the Board extended to the domestic certificated carriers serving Alaska and the Alaskan certificated carriers an exemption which permits them to operate between Alaska and Seattle on a temporary basis pending the settlement of the west coast shipping strike.

There was a notable improvement in air safety during fiscal 1948. The year just past saw considerable improvement in the handling and processing of accident investigations. The importance which the Board ascribes to this function is demonstrated by the fact that during the year the Accident Investigation Section of the Safety Bureau was redesignated the Bureau of

Safety Investigation and established as an independent unit reporting directly to the Board.

In the field of safety regulation, progress has been made in revising the Civil Air Regulations and bringing them up to date, particularly along the line of placing more responsibility for formulating safe practices and procedures upon the aviation industry, subject to the general supervision of the aviation agencies of the Government. The policy of gradually revising the Civil Air Regulations along this line will be continued in the next calendar year. It is gratifying to be able to report that the necessarily close relationship between the Board and the Administrator of Civil Aeronautics in the field of safety regulations has markedly improved during the past year.

One of the principal contributions which the Board and its staff have made to air safety regulation during the past year has been its participation in the preparation and finalization of United States positions relative to the International Standards and Recommended Practices as promulgated by the International Civil Aviation Organization. These standards, which aim at world-wide minimum standards of safety for the carriers of all member nations, constitute annexes to the Chicago Convention. The first three of these annexes are now in force.

Despite a slightly increased budget for fiscal 1949, the Board is still seriously handicapped by personnel insufficient to keep abreast of day-to-day matters and at the same time reduce its backlog. The Board's budget for 1950, which has been submitted to the Bureau of the Budget, contains a realistic estimate by the Board of the personnel necessary if it is to handle problems as they arise and reduce the backlog substantially. . . . .

### Air Transport Route Development

By the end of the 1948 fiscal year the domestic air transportation routes of the United States had expanded to a new record of 138,501 route miles, with 42 certificated air carriers authorized to serve a total of 746 cities.[3] Domestic air transportation decisions of the Board added 23,591 miles of new trunk-line and feeder routes to the interstate air transportation system, of which 12,217 represented trunk-line route additions and 11,374 miles represented temporary certification of experimental local-feeder and commuter service. This brought the total feeder and commuter service to approximately 24,000 route miles, with an additional 4,300 feeder route miles selected for operation by the Board but not yet certificated to the selected applicants. . . .

During the 1948 fiscal year the Board considered and passed on 101 new domestic route applications, 38 applications for extensions of existing routes, and 13 applications to engage in foreign air transportation. . . .

### Mail Rates

*Postwar air mail rate program*

With the end of the war 11 of the 16 domestic trunk-line air carriers were operating under service mail rates, 7 of which were established at 60 cents per ton-mile and 4 at 45 cents per ton-mile. Although no highly refined technique has been developed for distinguishing between subsidy and

[3] Route miles for certificated air carriers are computed on an airport-to-airport mileage basis, with all duplication of mileage within and between routes and carriers included in the total. Certificated airlines comprise 17 trunk-line carriers (including Catalina Air Transport), 2 territorial, 18 feeder and pick-up, 3 commuter, and 2 helicopter carriers. Cities authorized to be served by certificated airlines include 346 with trunk-line service only, 258 with feeder-line service only, and 142 with combination trunk-line and feeder-line service. Each certificated city is listed only once in this computation, regardless of the number of airlines serving it.

service elements of mail pay, none of these 11 carriers was considered to be receiving an element of subsidy for the carriage of mail. In the second half of 1946 the general financial condition of the air transport industry began to deteriorate rapidly, and carriers began to file for increases in mail pay. The fluctuations and instability within the industry did not permit the establishment of rates which would be final for any substantial period of time. Moreover, with virtually the whole industry petitioning at one time the Board did not have the staff to process final rates expeditiously. To meet this situation the Board started a temporary rate program.

The greater part of 1947 was devoted to the processing of emergency temporary rate cases; and by early 1948 virtually every carrier in the industry, both domestic and international, was on a temporary rate, although the temporary rate applicable in the case of the five largest carriers had been proposed as an upward adjustment in the final rate.

Prior to the establishment of temporary rates extensive studies were made of the financial developments in the industry since the war through 1946. These studies indicated a trend toward substantial overexpansion through the commitments of the air carriers for new equipment and acquisitions of equipment from war surplus sources, and furnished evidence of inadequate financing on the part of the carriers to meet the expansion program. The studies afforded the basic factual background in support of the initiation of the temporary rates in lieu of final rates.

Because of the transitional nature of the periods through which the carriers were passing, the difficulties were greatly increased in establishing final rates for the future, as well as for the substantial periods that have accumulated with the filing of petitions. If rates were to be established within a reasonable time, a way had to be found to shorten the normal procedures. It was felt that considerable time and effort could be saved in the long run if, in advance of the issuance of a show-cause order, the Board's staff and the carrier met for the purpose of developing all the facts essential to the establishment of a rate, as well as exchanging views toward a more thorough mutual understanding of the carriers' problems. In that way it was hoped that many issues would be resolved in accordance with well-established principles, and those issues that remained would be clearly defined. Thus the time that normally elapses between the issuance of a show-cause order and the final establishment of a rate would be considerably shortened. Accordingly, the Board officially authorized certain conference procedures on November 14, 1947. While it is still too early to judge the accomplishments of the conference procedure completely, there being certain difficulties in the procedure itself, it appears that to date the disposition of several cases has been materially facilitated.

Postwar regulation of mail rates has made it increasingly clear that effective mail rate regulation is dependent upon the carrier's entire rate structure. Rapidly rising wage and price levels caused substantial increases in the costs of the various carriers, which in turn were reflected in decreased earnings positions. Inasmuch as the Civil Aeronautics Act requires the Board, in setting mail rates, to take into consideration the need of the carrier after considering all other revenues, it was readily apparent that rising costs would result in increased mail pay to the carriers unless other revenues were increased by raising nonmail rates.

*Domestic mail rate proceedings . . .*

The critical financial condition of most domestic air carriers, intensified by rising costs, conversion to new aircraft types, declining load factors and a tapering-off in the long-term growth trend in passenger traffic, brought

about the extraordinary circumstance of a rate proceeding pending for every domestic carrier. Eight final rate orders were entered by the Board during the fiscal year. In the cases of four of the final mail rate orders the Board established a sliding-scale incentive mail rate, under which the maximum mail rate applies when the minimum passenger load factors occur and the mail rate gradually declines with increases in the passenger load factor above the minimum. The sliding scale is so computed that the carrier's over-all profit and rate of return will increase with greater development of its nonmail traffic.

The particular urgency of early establishment of permanent mail rates for the feeder lines stemmed from the fact that the temporary certificates under which the feeders have operated were limited to relatively short periods. During the year, permanent mail rates were set for three feeder lines, and substantial progress was made in processing an additional number of cases. During the fiscal year 28 temporary rate orders were adopted, 11 of which applied to trunk lines and 17 to feeder lines.

The Board directed the five largest domestic trunk lines to show cause why they should not be subject to a uniform service-rate formula. Under the proposed formula mail up to a certain volume would be carried at a service rate of 75 cents per ton-mile with additional volume carried at decreasing block rates graduated downward to 40 cents per ton-mile of mail carried in excess of 30,000 daily ton-miles in any month. The proposed service rate represented an increase over the rate of 45 cents per ton-mile received by four of the carriers and 60 cents per ton-mile received by the remaining carrier. However, each of the five carriers has filed exception to the proposed rate as a permanent rate; and accordingly, the five cases are awaiting further consideration by the Board. Meanwhile, the proposed service rate has been placed in effect as a temporary rate. . . .

### Air Carrier Services and Fares

*Services*

The Board received 2,731 operating-schedule filings during the year, covering changes necessitated by such factors as the inauguration of service at new points by existing carriers, inauguration of service by newly certificated carriers, the installation of new equipment, and the general increase in service throughout the domestic, overseas, and international air transportation network. The size of this increase is indicated by an analysis made of available seats scheduled weekly to and from 10 selected major cities throughout the United States, which shows an increase of 43 percent between April 1, 1946, and April 1, 1948, and 30 percent between August 1, 1946, and August 1, 1948. The increase in all cargo service of certificated carriers has also been significant. During the year the number of domestic one-way cargo flights increased from 136 to 286 flights per week, and the number of cities to which all cargo service was provided increased from 35 to 54. International all-cargo flights increased from 14 to 16 weekly, but the number of cities to which such service was provided decreased from 39 to 33.

Two carriers placed new postwar two-engine aircraft (the Martin 202 and Convair 240) in service over various segments of their systems. Where such service has been installed, flying time has been greatly reduced and the seating capacity has almost doubled. While the Board is mindful of the advantages inherent in the use of new types of equipment, plans for their use are being followed closely, so that, so far as is reasonably possible, communities with airports inadequate for new equipment will not suffer a decrease in service or temporary suspension of service should the older types of aircraft be completely replaced. Certain carriers have also inaugurated or increased

service with four-engine aircraft, providing improved service to and from the larger traffic-generating communities by means of long-range nonstop service. . . . .

*Tariffs, fares, and rates . . .*

During the fiscal year, the domestic trunk-line air carriers increased most passenger fares approximately 10 percent and at the close of the fiscal year their fares averaged 5.29 cents per mile, as compared with 4.69 cents per mile at the close of the previous year. The fares of the feeder carriers averaged 5.12 cents per mile as compared with 5.56 cents at the end of the previous period. The fares and rates of the larger irregular air carriers — which provide nonscheduled services — are for the most part considerably below the fares and rates of the certificated scheduled carriers.

Although the fiscal year witnessed an increase in the level of passenger fares of trunk-line carriers, it also saw increased experimentation with various types of excursion fares to stimulate travel during travel slumps. These excursion fares offered reductions in the price of round-trip transportation services subject to certain limitations on their use, such as a limited period of time within which transportation must be completed, the absence of reservation privileges, or a restriction as to the days on which travel could take place. . . .

During the past fiscal year 16 formal complaints concerning tariffs were received by the Board. . . . During the fiscal year 1948 the Board received 263 informal complaints regarding certificated and noncertificated airline tariffs and service. . . . Most of the complaints related to service deficiencies. The increased interest of the public in, and the desire for, adequate air service is shown by the fact that complaints regarding adequacy of service increased 100 percent over the preceding period. There was a noticeable decrease in the number of complaints involving passenger-handling functions and flight cancellations. Cases concerning loss or delay of air cargo shipments increased more than 76 percent over the previous fiscal year and cases pertaining to flight delay increased 36 percent. Complaints involving noncertificated air carriers decreased 15 percent. This reduction appears to have resulted from the additional economic controls which became applicable to these carriers on June 10, 1947. More than half of these complaints related to advertising, service, and loss, damage, or delay of air cargo. . . .

## Air Cargo Developments

The largest growth in air transportation during the past year occurred in the carriage of cargo, and the special problems presented by this type of traffic have assumed increasing importance to the Board. . . . In 1941, the last prewar year, cargo ton-miles came to less than 4 percent of passenger ton-miles; in 1945, the proportion reached 7 percent. In 1946 and 1947, respectively, the percentage of cargo to passenger traffic rose to approximately 10 and 20 percent, and it is probable that the proportion will reach 30 percent for 1948.

*Air freight routes*

Air cargo service has been offered not only by the certificated airlines, but also by a number of new firms carrying air freight exclusively. In 1946, 13 such firms filed applications for certificates of public convenience and necessity to engage in air freight transportation. After a public hearing, an examiner's report was issued in the *Air Freight Case*. The examiners recommended that five of the applicants be authorized to conduct a specialized freight-only service between specified areas in the northwestern, west

coast, southwestern, southern, central, eastern, and northeastern sections of the country. In addition, it was recommended that one carrier be authorized to conduct an experimental short-haul freight service in the southern part of Texas. These recommendations limited the authority to be granted to a temporary period of 3 years. At the end of the fiscal year this case was awaiting oral argument before the Board.

While the above proceeding was in progress, the Board on May 5, 1947, adopted section 292.5 of the Economic Regulations, which established a classification of air carriers known as "noncertificated cargo carriers" and which exempted such carriers from certain provisions of Title IV of the Act with respect to interstate and overseas air transportation of property only. This particular classification of carriers included those which, as of May 5, 1947, were actively engaged in the business of carrying property by air either irregularly as common carriers or, regularly or irregularly, as noncommon carriers, and which did not hold a certificate of public convenience and necessity, but had applications pending with the Boad for authority to conduct direct scheduled interstate or overseas air transportation of property only. Pursuant to its power under the Act, the Board granted to this new classification of air carriers authority to operate as a common carrier of property without obtaining a certificate of public convenience and necessity pursuant to section 401 of the Act. These carriers were, however, subjected to a considerable measure of economic regulation under other provisions of Title IV of the Act. The authority granted is for a limited time only and will expire 60 days after final Board action on any application filed by the particular carrier prior to May 5, 1947. The regulations also limit the geographical scope of operation by carriers in this class and confine them generally to service between points previously served on a more or less frequent basis. Most of the applicants in the *Air Freight Case* referred to above have availed themselves of the privileges accorded under the exemption regulation, and are operating various services pending determination of their respective applications.

*Freight rates*

Under the new regulation 292.5, the air cargo carriers were required to file tariffs with the Board. Such tariffs named rates considerably below those which the certificated air carriers had in effect. In August 1947 all of the certificated trunk-line domestic carriers and certain feeder-line carriers published a consolidated air freight tariff in which most of the volume rates formerly published in individual issues of the carriers were eliminated and the 100-pound rates were reduced approximately 25 percent, or from a basis of 26½ cents per ton-mile to 20 cents per ton-mile. In the fall of 1947 certain of the certificated carriers established specific commodity rates which were considerably lower than their general commodity rates, ranging as low as 12 cents per ton-mile. Several formal complaints against these specific commodity rates were filed with the Board, requesting their suspension and investigation. The Board declined to suspend but instituted an investigation of the rates. Later certain certificated carriers proposed to extend these rates to additional commodities and additional points, and to reduce the general commodity rates. As it was evident that a rate was developing between certificated and noncertificated cargo carriers, the Board acted to maintain the status quo of air freight rates, and suspend certain of these rates.

To avoid the inevitable results of destructive competition, the Board instituted a general investigation of air freight rates.[4] As a result of the

[4] Docket No. 1705 et al.

investigation, the Board fixed minimum rates of 16 cents per ton-mile for shipments of 1,000 ton-miles and under, and 13 cents per ton-mile for all in excess of 1,000 ton-miles per shipment to apply to all air carriers.[5] In its opinion fixing the 16-cent and 13-cent minimum rates, the Board held the proceeding open to permit any interested party to apply for modification of the minimum rates as to any commodity. Subsequently certain of the carriers filed petitions requesting that the minimum rates be modified to the extent of permitting them to establish lower rates in the unbalanced direction of traffic. In July 1948 this was permitted on a temporary basis for seven commodities on shipments originating at points in California, Texas, and Florida. At the same time the Board ordered a further investigation and hearing on all the petitions proposing specific directional commodity rates below the minimum rates. The carriers are making available to the Board detailed information on the movement of commodities, and a hearing before an examiner is scheduled for December.

*Freight forwarders*

The interest in direct air freight transportation so stimulated activity in the field of indirect air freight transportation that a number of firms have been organized to offer assembly and distribution services and act in the role of freight forwarders. Some 78 forwarders sought authority from the Board to participate in the forwarding services which it was anticipated would be required by the air freight industry. These applications were consolidated into a proceeding in which the Board also considered the request of the Railway Express Agency, Inc., for authorization to continue its air express operations and to engage in handling air freight on a permanent rather than a temporary basis. In order that it might have before it all pertinent data, the Board instituted and consolidated into this same proceeding an investigation into matters relating to the indirect carrying of property by air, excepting matters relating to rates. Specifically, the inquiry was to determine whether and to what extent there might be a general need for air freight fordwarder service or for an expansion of the air express services of the Railway Express Agency, Inc. . . .

An examiner's report was issued in this case recommending that the air freight forwarders be permitted to operate under exemption orders pursuant to section 1 (2) of the Act for such length of time as those operations may continue to be in the public interest, or until such time as appropriate amendments are made to the Civil Aeronautics Act which will meet the deficiencies that exist in the Act, which does not now provide for affirmative authorization of indirect air carriers. The report also recommended that Railway Express Agency, Inc., be permitted to continue to operate under the exemption order now applicable to its operations, and that the order be expanded to permit Railway Express to utilize the service of the noncertificated air cargo carriers.[6] . . .

## ECONOMIC REGULATION

*Changes in regulations . . .*

In the course of the fiscal year, the Board adopted a total of 16 amendments to the Economic Regulation. In the case of 12 of these amendments, the Board issued notices of proposed rule making. Numerous replies were received and considered. On 2 occasions the Board conducted hearings in the nature of oral argument before the Board as to the desirability of proposed amendments. . . .

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[5] Order E-1639, June 2, 1948.

[6] The Board's decision in the *Freight Forwarder Case* was issued September 8, 1948.

Among other things, these 16 amendments require irregular carriers and cargo carriers to file comprehensive reports with the Board; "small" irregular carriers are authorized to carry persons in foreign air transportation; some requirements are eliminated from the procedure for authorizing nonstop flights and obtaining authority to use airports; Alaskan air carriers are placed under separate regulations; and a new class of carriers is authorized in the Territory. . . .

The establishment of a reporting requirement for irregular carriers and cargo carriers was particularly important. The information obtained as a result of the regulation will be used by the Board in enforcing existing regulations and in appraising the need, if any, for changes in the regulations governing these forms of air transport services. Granting small irregular carriers the right to carry persons in foreign air transportation has opened up a new type of air transport activity which is virtually noncompetitive with scheduled operations, yet fills a definite public need and provides a new field for profitable air transport business. More particularly, it makes possible special flights by small planes into neighboring countries, especially Mexico and Canada, for such purposes as sporting expeditions or vacations in out-of-the-way places. The ban against carriage of persons in foreign air transportation by "large" irregular carriers was continued because of the adequacy of comparable services already afforded by the certificated carriers.

*Enforcement of regulations*

An increase in the number and activity of the irregular air carriers, accompanied by the promulgation of new Economic Regulations governing such carriers, resulted in a situation calling for new enforcement techniques. . . . Accordingly, in the case of irregular air carriers failing to file tariffs and otherwise failing to comply with the provisions of section 292.1 of the Board's Economic Regulations, orders were entered providing for the automatic suspension of the letters of registration held by such carriers unless they complied within 15 days. If compliance was effected, a method was provided for summary reinstatement of those letters suspended. Under the arrangement, 122 suspensions were ordered during the year. This method of enforcement proved to be effective. . . .

Informal enforcement action was taken in 151 cases involving a wide range of activities, such action usually taking the form of warning letters, conferences with the carriers, and an occasional stipulation by which the carrier agreed to refrain from certain operations considered unauthorized. Formal enforcement action was taken by the Board in six cases. . . .

Large irregular air carriers are not permitted to engage in the foreign air transportation of persons, and noncertificated cargo carriers are not authorized to engage in common-carrier operations between the United States and foreign points. Liaison between the State Department and the Board has resulted in closer surveillance over the operations of these carriers to and from foreign points. Upon request by air carriers for State Department intercession in securing landing rights from foreign powers, the Department formerly followed the practice of acting upon such requests without consulting the Board as to the operating authority of the applicant. During the year it was decided by the State Department that no further intercession would be made in these cases without prior clearance with the Board where there was any question as to the carrier's right under the Civil Aeronautics Act to conduct the contemplated operations.

Close cooperation is maintained with the Administrator of Civil Aeronautics to insure that foreign registered aircraft entering the United States under authority of a permit issued pursuant to section 6 (c) of the Air

Commerce Act of 1926 are not engaging in common-carrier activities. Since common-carrier flights by foreign-flag air carriers would be in violation of the Civil Aeronautics Act in the absence of specific authority therefor, the applications are referred to the Board for a determination as to whether or not they are engaging in common carriage. If the Board is of the opinion that the proposed flight does not involve common carriage, the Administrator is advised of such opinion and the permit generally issued; otherwise the permit is denied. Approximately 250 such applications were reviewed during the period covered by this report. . . .

*Noncertificated operations*

In the year following amendment of section 292.1 of the Economic Regulations to require irregular air carriers to secure letters of registration from the Board, 1,855 such letters were issued, 142 to large irregular carriers and 1,713 to small irregular carriers. Approximately 109 large irregular carriers and 1,701 small irregular carriers still held effective letters of registration at the end of the fiscal year, the numbers having decreased due to suspensions by the Board or voluntary surrender by the holders. . . . Applications for letters of registration by large irregular carriers listed 346 aircraft grossing over 10,000 pounds. This number included 247 Douglas DC-3's, 35 Douglas DC-4's, and 15 Curtiss C-46's. . . .

*Agreements*

A new postwar peak in cooperative intercarrier arrangements was reached during the fiscal year 1948, when 1,104 contracts and agreements were filed with the Board under section 412 of the Act. Concurrently, procedures designed to facilitate the disposition of constantly increasing filings were developed, which resulted in final Board action on 491 contracts and agreements.

During the fiscal year the Board reconsidered its approval of the participation of the United States air carriers in IATA. The previous approval had been for a period of 1 year. The Association, composed of some 60 or 70 companies engaged in international air transportation and representing some 50 sovereign states, revised its Traffic Conference procedures and regulations during this period to improve the efficiency of the organization. The Board reapproved the participation of the United States air carriers and the reorganization of the IATA Traffic Conferences for a period of 2 years, during which time it will consider and act upon the individual agreements adopted by the Traffic Conferences. . . .

The most significant decision by the Board to date on industry-wide agreements was made with respect to an arrangement involving the establishment and operation of Air Cargo, Inc. The latter has as its primary purpose the consolidation of existing ground facilities at the major airports for the handling of air freight transported by participating air carriers. The Board takes the position that cooperative arrangements, especially those of an industry-wide nature embracing large groups of certificated air carriers, should permit the future participation of other certificated air carriers upon an equitable basis. The Board indicated that if a group of air carriers could exclude, by restrictive admission provisions, any or all future participation by other carriers in arrangements for the consolidation of ground and terminal facilities, the advantage to the industry and the general public flowing from these arrangements would to that extent be diminished and the development of consolidated activites would be retarded.

Meanwhile, Air Cargo, Inc., proceeds to implement its ground consolidation functions with the accelerated filing of comprehensive pick-up and

delivery agreements. The new arrangements appear designed to eliminate a substantial amount of duplication and overlapping of ground services which had prevailed theretofore, in connection with the transportation of air freight. Over 100 such agreements had been filed as of the close of the fiscal period, and close to 200 are expected eventually as the program achieves its goal.

*Interchange of equipment and acquisition of control of air-carrier property*

The ideal air transportation system, as far as the public is concerned, would be a one-plane service between any two points in the country. However, the cost of providing such service by one company, even if possessing the requisite authority, would be prohibitive. Nevertheless, there are many pairs of points providing connecting services which do not generate sufficient traffic to justify the certification of a competing one-carrier service, but which could be afforded one-plane service. Through interchange of equipment, one-plane service could be established without the necessity of extending authorizations of existing carriers where such extensions are not justified by the traffic potential. Equipment interchange arrangements thus take on ever greater significance as the industry attempts to consolidate its present route structures and develop more fully their existing potentialities.

Under the Pan American-Panagra interchange agreement, approved by the Board, Panagra's planes fly up the west coast of South America to the Canal Zone, where the aircraft are then chartered by Pan American for through flight to continental United States. . . .

Also approved during the fiscal year was the TWA-Delta equipment interchange agreement providing for a connecting service at Cincinnati where the respective carriers install their own crews for the operation of the one-plane service over their routes. The approval indicated that the Board would be receptive in the future to similar proposals which provide single-plane through service without uneconomical duplication of existing services. . . .

A number of interesting problems arose during the past year involving the acquisition of control and property of air carriers. One of the most important of these involved the transfer by Western to United of its Denver-Los Angeles route, together with the physical properties appurtenant thereto, for a purchase price of approximately $3,750,000, which was about $2,000,000 in excess of the book value of the physical properties. The Board, with the Chairman dissenting, approved the transaction on the condition that the excess of the purchase price over the book value of the physical properties be charged to surplus on the books of United and excluded from its rate base in future mail rate proceedings. Upon representation that the charge to surplus would impair United's ability to pay dividends, the Board modified the condition to require that the acquisition excess be amortized out of earnings for a period of 5 years. Shortly thereafter the Board reopened the proceeding, which is still pending, to consider the financial provision which should be made by the parties for those employees displaced by reason of the purchase transaction.

Several of the problems currently pending present situations of original and novel significance. Among these may be found the first application by a "feeder" air carrier seeking to acquire a 151-mile route segment from a domestic trunk-line carrier; the first instance in which issues are raised respecting a potential increase in mail pay which may result from the merger of a wholly-owned subsidiary into the parent corporation; the first case in which issues are raised whether an increase in the extent or effectiveness of

a control over an air carrier by a person engaged in a phase of aeronautics requires additional Board authorization where the original acquisition of such control has previously been approved by the Board. . . .

SAFETY ENFORCEMENT

During the fiscal year 898 safety rule violation cases were filed with the Board and 13 cases reopened, making a total of 911 cases received, with a backlog of 618 cases from the preceding fiscal year. These cases involved for the most part disciplinary cases arising out of alleged violations of air traffic rules by holders of pilot certificates. Some of the cases involved violation by mechanics, a few involved air carriers classified as irregular or non-scheduled holding an air carrier operating certificate, and a few cases involved the physical qualifications of pilots.

During the year 416 suspensions and 209 revocations of pilots' certificates were ordered, 59 cases were dismissed, and 82 were withdrawn by the Administrator of Civil Aeronautics. In addition to these, 10 cases involving a review of the Administrator's refusal to issue an airman certificate made a total of 776 cases disposed of during the fiscal year. Of the cases disposed of, hearings were held in approximately one-third. . . .

TABLE OF ACCIDENTS — FISCAL YEAR 1948

| Operator | Reported | Extensively investigated |
|---|---|---|
| Scheduled domestic operators | 58 | 40 |
| Scheduled international operators | 15 | 10 |
| Irregular domestic operators | 34 | 22 |
| Irregular international operators | 2 | 1 |
| Alaskan operators | 14 | 5 |
| Total air carrier accidents | 123 | 78 |
| Non-air-carrier | 9,794 | 1,569 |
| Total all types of accidents | 9,917 | 1,647 |

LEGISLATION

During the fiscal year 1948 the following six amendments to the Civil Aeronautics Act were passed:

1. Under the provisions of § 1003 (b) of the Act, if an air carrier desired to provide through service with a common carrier subject to the Interstate Commerce Act, it was required that the carriers establish joint rates for such through service. However, it was found that the mechanics of agreeing upon joint rates and the division thereof, and the duplicate publication of such rates in the tariffs of each carrier, would have the effect of preventing the establishment of through service between air carriers and surfaces carriers on a wide scale. Accordingly § 1003 (b) was amended by eliminating the requirement that joint rates be established in such a case, and substituting a requirement that just and reasonable rates be established.[7]

2. Section 401 (l) of the Act, amended in 1942, because of wartime conditions, to authorize an increase in the maximum number of hours which pilots could fly in a given period, was amended to reinstate the original provision that rates of compensation, maximum hours, etc., of air carrier pilots and copilots should conform to decision numbered 83 of the National Labor Relations Board.[8]

3. A new section, numbered 504, was added to clarify the liability of a holder of security interest in an aircraft for injury or death caused by aircraft to third persons on the surface.[9] The laws of some States provide that an owner of aircraft shall be absolutely liable for injuries caused by such aircraft to persons and property on the ground. This has raised a question as to whether holders of a security interest only, such as conditional vendors

[7] 61 Stat. 763. [8] 61 Stat. 449. [9] 62 Stat. 470.

or holders of equipment trust certificate, may not be absolutely liable in such cases. This doubt in the minds of bankers and lending institutions had been sufficient to handicap air carriers seriously in financing the purchase of new equipment. The new section 504 was enacted to eliminate this difficulty by providing that no person having a security interest in aircraft shall be liable solely by reason of such interest for injury or death to persons, or damage to property, on the surface.

4. Another provision designed to remove impediments to air carriers in their financing arrangements was the amendment to section 504 relating to recording of aircraft ownership.[10] The amendment broadens the recording provisions of the Act to permit the recording of two additional types of liens; the first, specific liens on certain types of engines, the second, the so-called "floating charge" or "basket-lien" on spare parts.

5. Section 302 was amended by adding a new subsection lettered (d), which will enable the Administrator of Civil Aeronautics to train air-traffic control-tower operators, either through the use of his own facilities or by contract with educational institutions.[11]

6. Several sections of the Act were amended to clarify and amplify the powers of the Administrator of Civil Aeronautics and the Civil Aeronautics Board.[12] A new section, numbered 601, was added authorizing the Civil Aeronautics Board to delegate to the Administrator the power to prescribe rules and regulations relating to safety. As stated in the report of the House Committee which considered the matter, it is the purpose of this amendment to facilitate coordination between the Board and the Administrator, and to provide only such delegations at an operating level as are necessary to effectuate practical administration of the safety regulations.[13] It is not anticipated that the Board will employ this power of delegation to effectuate on a permanent basis any large-scale transfer of rule-making power to the Administrator.

In addition, a number of laws pertaining to aviation were passed which were not in the form of amendments to the Civil Aeronautics Act, but nevertheless have an important effect upon the activities and responsibilities of the Board. These included legislation setting up an air parcel post system and similar laws, many of which affected the Administrator of Civil Aeronautics more than the Board. . . .

The past year witnessed a continued increase in air transport services performed by other than scheduled air lines, and the situation presents numerous problems for consideration by the Board. Certain air transport services performed by other than scheduled carriers do not fall under the economic jurisdiction of the Board because the Civil Aeronautics Act defines the regulatory power of the Board over economic matters in terms which limit it to "common carriage." Thus certain operations conducted by private carriers for hire are not subject to the economic regulatory jurisdiction of the Board. The gap in the Board's jurisdiction leaves unregulated an increasingly large portion of air transport operations performed by private carriers for hire and greatly handicaps the Board in its administration of nonscheduled common-carrier activities. It is imperative, in the Board's opinion, that legislation be enacted granting the Board regulatory power over contract carriers. . . .

In addition, legislation should be enacted, as recommended in previous Annual Reports, authorizing the Board to regulate rates for foreign air transportation and to control issuance of securities by air carriers.

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[10] 62 Stat. 493. [11] 62 Stat. 1093.

[12] 62 Stat. 1216.

[13] House Report No. 2315, 80th Cong. 2d. Sess.

# STATE AND LOCAL

**Department Editor: Madeline C. Dinu***

## NASAO ACTIVITIES

THE twelve-months ahead should see new ideas and new methods for aircraft and airport uses introduced in the various states based on good business principles of competition in a free enterprise system unhampered by too much centralized regulatory restrictions. Not the least of these is the warehousing of merchandise for air cargo at airports located away from industrial centers, bringing in revenue to the airport as well as business to the communities in increased personnel.

Smoother working of the Federal Airport Program is noticeable. Many legal and economic problems initially confronting both the federal and state aviation agencies have been resolved to a great degree, and there is an increasingly apparent spirit of coordination contributing to the goal of a nation-wide network of airports as "going concerns."

The G.I. Flight Program, while decreased in size and scope, is still a mainstay in local aviation. There is a definitely improved relationship between the Veterans Administration at federal, regional and local levels, and both state agencies and the local operators.

There is still much to be accomplished toward a solution of the enforcement problem. Agreement has yet to be reached on the proposal for amendment to the Civil Aeronautics Act empowering state agencies and state courts to enforce federal laws and regulations. While a purportedly agreed to Committee Print Bill has been drafted and is in Committee the probabilities are that public hearing will be demanded by a segment of the state people to bring Congressional and public attention to their position, arising from their responsibilities to their own citizens in providing for safety from irresponsible use of the air by prompt and effective local enforcement. There is strong hope, however, that this year will see a workable compromise of this basic problem.

In the matter of reactivation of war surplus airports returned to the local communities under agreements containing thirty-days clauses, the Act authorizes return of such facilities as surplus. It is true that a community and its citizens are on notice that the armed services have the right to "take back" an airport by giving the contracted thirty-days notice of their intent to do so. Businessmen have invested thousands of dollars in locating operations on such airports, constructing hangars, repair shops and employing personnel, and the airport is thus being maintained as an active facility. Their investments are, as a consequence of reactivation, wiped out. There is a definite *public interest* in such businesses at airports, from the economic standpoint of the entire aviation industry and national stability, to transcend the principle of "caveat emptor" established for purely private commercial enterprises. Common-sense might direct that the services arrive at a policy of not reactivating such airports when there are other war-built facilities in the near area, or, in the alternative, not to have them declared surplus if

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there is any probability of needing them for military purposes within a short time thereafter.

The states are becoming more keenly aware in recent months of the implications in the ICAO (International Civil Aviation Organization) activities as they affect private flying and airports from both technical and economic viewpoints. Recommended standards and practices already in published form have been in great part predicated on scheduled airline requirements, with but small attention to their restrictive application on private flying. Again, on the recent standards for charges at airports, certain formulae have been recommended in arriving at charges which may not be in keeping with good business standards for the proper financial maintenance of such airports. While the international airlines should certainly not be overly-burdened by excessive charges at airports, there is a middle ground which can be reached *if persons or groups who work up such standards are selected to represent all parties in interest.* The NASAO anticipates taking a more direct interest and participation in such ICAO activities through its representation on the Air Coordinating Committee, as well as observing ICAO at work at Montreal. Were the states consulted at the time the Chicago Convention was drafted and adopted? After forceful arguments before the President's Air Policy Commission and the Congressional Aviation Board, the states were admitted to the aviation policy making group of the United States as the State-Local Panel of the Air Coordinating Committee, where their voices may now be heard, four years after the Chicago convention was adopted.

Some of the state aviation agencies have been approached for approval of local helicopter activities in recent months. This is one of the new methods of air use which will require intelligent coordinated attention, not only from the standpoint of carriage of mail or commuter service within metropolitan areas, but from other commercial uses. Safe altitudes, safe routes, heliports, and heliaids, as well as helicopter air traffic rules and operations at established airports, are matters which will come up for considerable discussion at both federal and state levels during this year. Before any firm policies or rules and regulations are adopted by either level of government, it would be logical to have joint public conferences with the Helicopter Council, of which Mr. L. Welch Pogue is President, in the light of technical and use developments in that field during the past two years. For long-range thinking, aviation agencies could well begin discussions with federal and state highway people *in prospect of use of airspace over road beds and within purview of highway easements for overhead buttressed "heliplatforms,"* so that legal provisions are incorporated in public highway rights being presently acquired.

In the matter of state economic regulation of intrastate air transportation, it is felt that the Report of the Technical Advisory Committee appointed by the Aeronautics Commission of Indiana would be of interest at this time, and is hereinafter reproduced. This Report and its Conclusions are for the guidance and use of the State of Indiana, and it is not to be construed as the stand of the NASAO; several of the states have other factors to consider in their view of the matter, based upon their location in respect to transcontinental air routes, their terrain, available surface transportation, and economic needs and potentialities of air uses by their communities. It is interesting to note, however, that Indiana stresses the importance of greater opportunity for participation in determination of air routes within its borders before and with the Civil Aeronautics Board.

M. C. D.

## INVESTIGATION OF STATE ECONOMIC CONTROL AND REGULATION OF AIR COMMERCE — REPORT OF TECHNICAL ADVISORY COMMITTEE APPOINTED BY INDIANA AERONAUTICS COMMISSION*

*In the matter of the investigation of the position of the State of Indiana on economic control and regulation of air commerce.*

This proceeding is pursuant to Section 8 of the Indiana Aeronautics Commission Act of 1945 and is instituted on the Commission's own motion to determine what, if any, action should be recommended by the Commission to the Legislature dealing with the economic regulation of intrastate air transportation within Indiana.

For the purpose of this proceeding the Commission created an Advisory Committee to consider the evidence and make recommendations as to what the Commission ought to do. The Advisory Committee consists of Mr. Herschel A. Hollopeter, Transportation Director, Indiana State Chamber of Commerce, Chairman; Professor L. L. Waters, Transportation Section, School of Commerce, Indiana University; and C. T. Coy, Traffic Manager, Eli Lilly & Company. The Commission also delegated Director C. F. Cornish to preside at and conduct the hearing.

Public hearings were held after due general notice to all interested parties at Indianapolis, Indiana, on September 14, 15 and 17. Ample opportunity was given to anyone appearing to be heard. Various representatives of air carriers appeared and presented evidence and testimony on this subject. No one appeared nor was any evidence presented, although requested, by the competing forms of transportation, namely railroads and highway carriers.

The principal question to be explored as indicated in the notice and invitation to the various parties, is that of whether there is a need for the State to exercise its jurisdiction over economic regulation of intrastate air transportation, and if so, by which agency. Another definite but related question was whether the State should seek more effective relationship and coordination between state and federal authorities in determination of air route patterns within such state.

### The Evidence

The evidence in the record being largely confined to expressions from representatives of the carriers by air or those to be regulated, is to the effect that the state should not exercise its economic regulatory powers over intrastate air commerce at this time. The evidence on behalf of the smaller air carriers seems to indicate that closer coordination between federal and state authorities with respect to air route patterns is desirable. Evidence from the larger airlines serving the State did not support this position, neither did they definitely oppose it. There was some evidence presented by a member of the staff of the Indiana Aeronautics Commission in support of the latter proposition which will be carefully analyzed and considered later in this report. Such evidence and testimony was not an official presentation on the part of the Commission but merely presented for the record to be carefully weighed and evaluated in the light of all the other circumstances. It has not yet been considered officially by the Commission and does not represent any established view or position with respect to this matter.

In reviewing the record and evidence developed by the hearing, the Technical Advisory Committee first sought out a basic fundamental theory upon which it could make its determination concerning a subject affecting

* Aeronautics Commission of Indiana Docket No. 23. This report was adopted by the Aeronautics Commission of Indiana at its December meeting.

the public interest. We found this fundamental in the famous opinion of Chief Justice Waite in the case of Munn v. Illinois, 94 U.S. 113, wherein it was stated that, "Property does become clothed with a public interest when used in such a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

With the above principle in mind we further decided that certain tests should be applied relative to the public interest in intrastate air transportation. These tests turn on (1) the exacting of excessive charges, (2) person or place discrimination, (3) safety, and (4) deleterious effects of unfair or destructive competitive practices on other forms of transportation because of the absence of state regulation.

We have applied the four tests above set out and make these particular findings:

1. There was no testimony or evidence in the record to indicate excessive air transportation charges on Indiana intrastate traffic. No one contended that present intrastate air transportation rates for the transportation of either passengers or property were excessive. On the other hand the record does establish the fact that the charges, being assessed on this Indiana intrastate traffic are on exactly the same basis as the fares and charges maintained and collected by the respective carriers on their interstate traffic. A complicating factor in state regulation of rates for air transportation is the fact that mail pay is statutorially used to maintain airline service.

2. Person and place discrimination which occasioned other forms of regulation has not developed in this state, according to the record, to the point of requiring state regulation.

3. The record indicates that all commercial air transportation within the State is conforming to comprehensive federal safety regulations and there appears to be no need for augmentation of this by intrastate regulation at this time.

4. We find in the facts presented, no evidence of deleterious effects upon other forms of transportation within the State. This view is further strengthened by the fact that the volume of intrastate air transportation, and especially in proportion to interstate air transportation, does not necessitate intrastate regulation. It is a well-known fact that air transportation at present is essentially long distance in character. For example, from this record, the Chicago and Southern Airline, doing the largest Indiana intrastate passenger business of any airline serving the State, averages about $10,000 per month intrastate passenger revenue. This figure represents approximately 2 per cent of that airline's system total and includes approximately 5 per cent of the total number of passengers it carried.

### CONCLUSIONS

Therefore, the Committee concluded that:

1. There is no present need for the State of Indiana to exercise its powers to establish economic regulation of intrastate air transportation.

2. Since no regulation is needed the question becomes moot as to which agency of the State should exercise regulation.

3. We conclude that the record supports the premise that the State should be recognized to a greater extent in air route pattern determination. The Civil Aeronautics Act of 1938 should be amended to permit the States to intervene with the full rights of any other party to proceedings involving air route patterns and the development of adequate and more efficient air transportation. We would recommend that the State Legislature memorialize Congress on this point.

# JUDICIAL AND REGULATORY DECISIONS

Department Editor: Francis T. Crowe*

## THE AIR CARRIER'S DUTY TO BARGAIN UNDER THE RAILWAY LABOR ACT — THE NATIONAL AIRLINES STRIKE

The recent labor difficulties experienced by National Airlines have brought into sharp relief the duties of the air carrier to bargain under the Railway Labor Act, as amended.[1]

The disputes had their beginning in September, 1945 when Maston O'Neal, one of National's pilots and a member of the Air Line Pilots Association (ALPA), was involved in an accident at the Tampa, Florida, airport on one of the carrier's scheduled flights. The carrier discharged him. He demanded a review of the propriety of his discharge, such review being provided for in the agreement between the carrier and ALPA, the recognized representative of the pilots. This review resulted in a deadlock in the System Board of Adjustment, comprised of two members selected by the carrier and two by the union. There was no provision in the agreement for overcoming this impasse.[2]

In May, 1947, the National Mediation Board called the parties together, and it was agreed that the Board would appoint a neutral referee to break the deadlock. The Board subsequently appointed a member of the Civil Aeronautics Board staff. ALPA objected to this appointment because of possible bias. The appointee declined to serve. The Board then chose another referee who was refused by the carrier for no other apparent reason than that it was exercising its prerogative as it felt the union had done.[3]

By November, 1947, ALPA issued a strike notice. The National Mediation Board persuaded the pilots' union to postpone its walk-out, and the parties were once again called together for mediation of the dispute. The carrier offered to have three neutrals appointed. Before reaching an understanding ALPA insisted that one was sufficient. The president of ALPA was called away on official union business and the carrier withdrew its offer.

Meanwhile the International Association of Machinists (IAM), which had been certified in August 1947, as the legal bargaining representative of the carrier's clerks, deadlocked with the carrier in December, 1947 over the latter's demand to have the unlimited right to sub-contract work and union's demand that no sub-contracting be allowed. During the negotiation period the carrier granted its clerks, who were not as yet under any contract, a unilateral wage increase. The carrier's president made several anti-union statements to his employees which were enforced by further benefits being granted to the clerks. The IAM took a strike vote. Efforts by the National

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[1] The original Act is Title I, 44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934), 45 USCA §151 *et seq.* (1943). Title II, the air carrier provisions, was added in 1936, 49 Stat. 1189 (1936), 45 USCA §§181-188 (1940), to make the complete title, the Railway Labor Act, *as amended.*

[2] For a factual history of the dispute, see the letter written by Frank P. Douglas, chairman of the National Mediation Board, to Senator McCarran published in Aviation Week, March 22, 1948, p. 44. See also Aviation Week, March 15, 1948, p. 11. McNatt, *Labor Relations in the Air Transport Industry Under the Amended Railway Labor Act,* 45 U. of Ill. Bulletin, 64 (1948).

[3] "No reason was given to support such challenge (of the second referee) except that the Association had protested the appointment of the first designated referee." Emergency Board No. 62's Report to the President, p. 8, "In re Certain Differences between National Airlines, Inc. and certain of their employees represented by the Air Line Pilots Association, International, and the International Association of Machinists."

Mediation Board failed to bring the parties to any agreement. Arbitration was agreed to by the IAM, but on December 11, 1947, the carrier refused to accept "at this time". On January 23, 1948, the IAM clerks walked out. The Mediation Board, then, requested the carrier to reassure the striking employees that they would not be discriminated against if they returned to work which the carrier did on the following day but the clerks stayed out.[4]

On February 3, 1948, because they were apprehensive of inadequate maintenance and believed the carrier had breached its agreement of May 1947, to accept a neutral referee, the ALPA employees struck.[5] The next day the carrier notified the National Mediation Board that it would accept the appointment of one neutral to settle the two year old dispute. On the fifth, the National Mediation Board requested the parties to meet February 7, 1948, and it informed ALPA of the carrier's proposal. The union accepted this proposal by phone. On the seventh, the president of ALPA and an attorney for the president of the carrier met. The carrier informed the Board that it had discharged all its ALPA pilots the day before.[6] Further efforts to compose the differences ceased.

The carrier resumed operations with newly hired pilots, and the strike continued.[7] The Mediation Board recommended to the President of the United States that he appoint an emergency fact-finding board, pursuant to the powers given him under the Railway Labor Act, as amended, to investigate the ALPA dispute. On May 15, 1948, the President appointed an emergency board. After hearings were under way, IAM convinced the Mediation Board that its controversy be disposed of at the same time. On June 3, 1948, the President redesignated the emergency board.[8]

### Jurisdiction of Emergency Board

This board was at once faced with a challenge of its jurisdiction.[9] Section 10 of Title 1 of the Railway Labor Act, as amended, provides:

> "If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute."[10]

It was contended by the carrier that by its resumption of scheduled flights there had been no interruption of commerce such as contemplated in the legislation.

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[4] On January 24, 1948, the IAM mechanics stopped work to avoid crossing the clerk's picket line.

[5] Aviation Week, February 16, 1948, p. 10.

[6] Aviation Week, March 15, 1948, p. 11.

[7] Aviation Week, March 8, 1948, p. 40.

[8] Emergency Board No. 62 was originally created by Executive Order No. 9958, dated May 15, 1948. The Board was redesignated on June 3, 1948 to investigate the IAM strike by Executive Order No. 9965. The Board was headed by Grady Lewis, as chairman, with Walter V. Schaefer, Professor of Law at Northwestern University Law School, and Curtis W. Roll, as members.

[9] American Aviation Daily, May 25, 1948, p. 127.

[10] 48 Stat. 1197 (1934), 45 USCA §160 (1940). This section of Title I is made applicable to air carriers by Title II, §201, 49 Stat. 1189 (1936), 45 USCA §181 (1940) which provides: "All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

It may be a valid argument that this section of the Act may not apply to air carriers with the same force that it does to railroads. First, the statute speaks of "essential transportation service".

There can be no doubt that rail transportation is essential to our integrated, industrial society whose very foundation is rapid, uninterrupted communication. "Essential" when applied to the air carrier, on the other hand, is necessarily of a different degree. Air carriers are authorized to fly routes only when "such transportation is required by the public convenience and necessity."[11] Therefore, it logically follows that every air carrier certified by the Civil Aeronautics Board is, by definition, "essential" in the sense that the term is used in the statute.

Assuming, then, that an air carrier is forced to curtail its service because of labor difficulties, that the Mediation Board finds a threat to commerce and informs the President who thereupon creates an emergency fact-finding board, can a question of the emergency board's jurisdiction be raised during the investigation by the board? The present board evidently thought not, declining to rule on it.[12] The Act refers to the President's discretion. Whether this is reviewable by any court appears doubtful, especially when the only purpose it serves once exercised is to "mobilize public opinion".[13]

Even if, as the carrier contended, the board should have gone into the question of its power, the company might have had difficulty sustaining its position on the facts. It appears from the carrier's report to the CAB that in April 1948, the month before the emergency board was appointed, it was offering the public less than fifty percent of the space it had available in April, 1947.[14] Nor did this situation improve appreciably in the subsequent months.

## The ALPA Case

There is adequate basis for concluding that the conduct of the carrier in its relations with ALPA in the O'Neal case was a violation of its statutory duty to bargain under the Railway Labor Act, as amended. The Act requires the carrier "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce . . ."[15] The arbitrary action of the carrier in ob-

[11] *The Civil Aeronautics Act of* 1938, §401(d)(1), 52 Stat. 937, as amended by 54 Stat. 1233 (1940), 49 USCA §481 (Supp. 1947).

[12] Although the issue was presented by both parties in their briefs to the Emergency Board, the Board did not consider it in their Report to the President.

[13] House of Representatives, Report of Committee on Interstate and Foreign Commerce, H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926). As to executive discretion and its reviewability by the judiciary, see *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111, 113 (1947), (grant of foreign air route); *United States v. Bush & Co.*, 310 U.S. 371, 380 (1940), (fixing tariff standards); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), (finding that prohibition of sale of arms would help reestablish peace); *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, 184 (1919), (determining essentialness to security and defense in seizing telephone lines); *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910), (determination of an obstruction to commerce and navigation); *Martin v. Mott*, 25 U.S. 12, 19 (1827), (ascertaining an emergency to call out the militia).

[14] CAB Recurrent Reports of Mileage and Traffic Data, April, 1948, sheets for National Air Lines, domestic and foreign service; Eastern Air Lines, domestic and foreign service; and Delta Airlines.

[15] Title I, §2, First, 48 Stat. 1186 (1934), 45 USCA §152 (1940). This section is made applicable to air carriers by Title II, §202, 49 Stat. 1189 (1936), 45 USCA §182 (1940). The Emergency Board found: "The evidence establishes that this statutory duty has not been performed by the Carrier. Over the entire period from the date of O'Neal's discharge, September 27, 1945, to the date of the strike, February 3, 1948, everyone of the many efforts to dispose of the dispute was initiated by the Association; in no instance did the Carrier take the initiative and it was induced to act at all only when confronted by the threat of a strike.

jecting to the second neutral appointed by the Mediation Board seems to typify the attitude of the carrier towards collective bargaining procedures.[16] Reasonable effort transcends capricious exercise of privileges.[17] It also appears from the facts that on at least two occasions the carrier was induced to take action only after the threat of a strike vote. This, in itself, is not unusual, but it cannot be said to be indicatory of willingness to cooperate with the recognized bargaining agent.[18]

The carrier charged as an affirmative defense that ALPA had violated the act by going on strike while the Mediation Board was in contact with the parties and attempting to prevent an interruption to essential transportation service, thereby going directly in the face of the avowed purposes of the Act.[19] The Act was passed to prevent strikes in the railroad industry which lead to interruptions in interstate commerce. However, it is doubtful that the Congress which passed the original Act intended it to restrict the employees' right to strike in any material manner in order to effect the purposes of the Act.[20] Therefore, the more compelling consideration is that the carrier's attitude was not conducive to peaceful labor relations in interstate commerce, and that it had violated its statutory duty to "exert every reasonable effort" to settle its disputes.

### THE IAM CASE

The case against the carrier for violating the Railway Labor Act, as amended, by its tactics toward the IAM is well supported by decisions under

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What was sought by the Association was reasonable. It did not seek reinstatement of O'Neal. It sought only an impartial determination of the propriety of his discharge. Such a determination has not been had to this date. Failure to afford it caused the strike, and responsibility for the strike rests with the Carrier." Emergency Board No. 62's Report to the President, pp. 12-13. For a survey of the carrier's duties and obligations under the Railway Labor Act, as amended, see Elggren and McCraith, *Aviation ABC's of the Railway Labor Act*, 13 J. Air L. & C. 39 (1942).

[16] The Emergency Board, agreeing with the union that the Mediation Board's first choice was an unfortunate one, stated: "It is elementary that authority to appoint a neutral to determine a dispute is not exhausted by a single nomination and that if the first nominee does not act, successive nominations may be made. The authority is determined only when it has been effectively executed." Emergency Board No. 62's Report to the President, p. 14.

[17] The Emergency Board concluded: "The story revealed by the evidence is one of disregard for statutory and contractual obligations on the part of the Carrier. It indicates an immaturity and lack of responsibility which is not consistent with the duties imposed by Congress upon carriers in Interstate Commerce." Emergency Board No. 62's Report to the President, pp. 14-15.

[18] The Supreme Court in speaking of the duties under the statute stated: "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences — in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by section 2, First." *Virginian Ry. Co. v. Federation No.* 40, 300 U.S. 515, 548 (1937). Emergency Board No. 62's Report to the President, pp. 12-13.

[19] 48 Stat. 1186 (1934), 45 USCA §151a (1940). "The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions."

[20] Note the recognized restriction on the right to strike in the Act, cited note 38 *infra*.

that Act itself and the National Labor Relations Act.[21] The carrier, by encouraging a "company union" through its offer of free legal services, went directly against the mandate of section 2, Fourth, of Title I of the Act.[22] Under this same provision any attempt on the part of the carrier's president to induce his employees to refrain from joining the union is prohibited. This sort of suasion would have constituted an unfair labor practice under the Wagner Act, and would have been evidence of a lack of good faith at "the collective bargaining table".[23] The Taft-Hartley Act unambiguously modified this sector of Congressional collective bargaining philosophy by providing in section 8(c) that such expressions unaccompanied by a "threat of reprisal or force or promise of benefits" shall not constitute an unfair labor practice or be evidence thereof.[24]

One conclusion which might be drawn is that, whereas the "employee-coercing" provisions of the Railway Labor Act and the Wagner Act are consistent manifestations of Congressional attitude on the subject, the more recent Taft-Hartley Act has set a standard for judging employer coercion different from that which is still being applied to rail and air carriers, for with the carriers, "an employer stand" on the union question may still be used as evidence of his failure to bargain collectively in good faith.[25]

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[21] *The Wagner Act*, 49 Stat. 449 (1935), 29 USCA §151 *et seq.* (1940). Cases cited note 22 *infra.*

[22] 48 Stat. 1186 (1934), 45 USCA §152 (1940). ". . . it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."

[23] *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 78 (1940); *N.L.R.B. v. Peterson*, 157 F. (2d) 514, 515 (CCA 6th 1946) *cert. denied*, 330 U.S. 838 (1947); *N.L.R.B. v. American Pearl Button Co.*, 149 F. (2d) 311, 315 (CCA 6th 1945); *N.L.R.B. v. Laister Kaufman*, 144 F. (2d) 916 (CCA 8th 1944); *N.L.R.B. v. Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 301 (CCA 6th 1943); *N.L.R.B. v. Falk Corp.*, 102 F. (2d) 382, 389 (CCA 7th 1939). *Cf. N.L.R.B. v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941); cases collected in 146 A.L.R. 1017 (1943). Sinsheimer, Employer Free Speech, 14 U. of Chi. L. Rev. 617, (1947).

[24] 61 Stat. 136 (1947), 29 USCA s158 *et seq.* (Supp. 1947). Note that those industries under the provisions of the Railway Labor Act, as amended, are specifically exempted from both the Wagner Act, 49 Stat. 450 (1935), 29 USCA §152 (2) (1940), and the Taft-Hartley Act 61 Stat. 137 (1947), 29 USCA §152 (3) (Supp. 1947). The Emergency Board did not comment on the possible influence of the Taft-Hartley philosophy on the term "collective bargaining" as it is used in the Railway Labor Act, as amended.

The Board concluded: "In its dealings with the Association, National has repeatedly been guilty of conduct which violated the provisions of the Railway Labor Act. Identical conduct, in the statutory setting of the National Labor Relations Act, is uniformly held to constitute 'unfair labor practices,' and to warrant the enforced reinstatement of the striking employes. The Carrier's disregard of its statutory duty was not isolated or accidental; on the contrary, it was repeated and deliberate. And it contributed directly and immediately to the situation out of which the strike arose. It is, therefore, the recommendation of the Board that the employes who have refused to work during the pendency of the strike should be reinstated as working employees of the Carrier." Emergency Board No. 62's Report to the President, p. 28.

[25] Compare *Texas & N. O. Ry. v. Brotherhood of Railroad Clerks*, 281 U.S. 548 (1930) and *Virginia Ry. Co. v. Federation No.* 40, 84 F. (2d) 641, 643-644 (CCA 4th 1936) with the viewpoint expressed in Mulroy, *The Taft-Hartley Act in Action*, U. of Chi. L. Rev. 595, 611-615 (1948). It is not sufficient to say that the transportation industry is to be judged by a different standard than the rest of industry, for the Supreme Court has stated that the Congressional philosophy of collective bargaining as embodied in the National Labor Relations Act, is analogous to that embodied in the Railway Labor Act, as amended. "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of

Collective bargaining, by definition, precludes unilateral action.[26] Although the carrier refused to discuss any of the employment improvements which were subsequently granted unilaterally until the matter of sub-contracting had been settled, negotigations were in progress with a certified bargaining agent. The carrier claimed that its action in raising wages and granting vacation benefits did not violate the Act in that the beneficiaries were not covered by an agreement, hence was not within the prohibitions of the Act.[27] Even though the IAM employees were not covered by a contract, such action still is indicative of a lack of bargaining collectively in good faith.[28] Section 2, Ninth, of Title I of the Railway Labor Act, as amended, makes it mandatory for an employer to "treat with" the certified representative of his employees.[29] Therefore, it appears that the carrier's unilateral action under these circumstances was a violation of its statutory duty to bargain.[30]

The carrier's most potent argument was that the IAM had violated section 5 of Title I of the Act by calling the strike January 23, 1948.[31] It was the carrier's contention that neither party could change the status quo for thirty days after the notice that mediatory efforts had failed. The Mediation Board gave such notice on the 21st of January. The IAM interpreted the statute to mean that, if this section applied to unions at all, the status quo could not be altered until thirty days after arbitration had been rejected, which, in fact, occurred some 42 days previously.

Looking at the Railway Labor Act as a whole it contemplates first, that the parties exercise reasonable efforts to compromise their differences;[32] secondly, should this fail, the Mediation Board shall attempt to bring about a reconciliation; thirdly, if there is no settlement resulting from these efforts, the Board shall endeavor "as its final required action" (except for the

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bargaining as worked out in the labor movement in the United States." *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-347 (1944). To the same effect: *General Committee v. M.K.T.R. Co.*, 320 U.S. 323, 335 (1944); *J. I. Case v. N.L.R.B.*, 311 U.S. 514, 523-526 (1940); *Brotherhood of Railway and Steamship Clerks v. Virginia Ry. Co.*, 125 F. (2d) 853 (CCA 4th 1942).

[26] "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well . . . block the bargaining representative in securing further wage adjustments." *May Department Stores v. N.L.R.B.*, 326 U.S. 376, 385 (1945).

"But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation" of the bargaining agent. *Medo Corp. v. N.L.R.B.*, 321 U.S. 678, 684-685 (1944).

[27] Title I, §2, Seventh, 48 Stat. 1186 (1934), 45 USCA §152 (1940) provides: "No carrier, its officer, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements. . . ." (emphasis supplied).

[28] "Most significant was the action of Cayia (the company superintendent) in announcing the vacation rule two days before the May 10th meeting (with the bargaining representative), when it was to be the subject of bargaining between the employer and the union. This action was more than merely tactless. It evidenced a wilful and deliberate contempt for the whole plan of collective bargaining." *Inland Lime & Stone Co. v. N.L.R.B.*, 119 F. (2d) 20 (CCA 7th 1941).

[29] *Virginian Ry. Co. v. Federation No.* 40, 300 U.S. 515, 545 (1937). See pp. 9-10 of McNatt article cited note 2, *supra.*

[30] "By its unilateral actions concerning matters properly the subject of collective bargaining, National Airlines violated the duty imposed upon it by statute. National's persistent and repeated violations of the duties imposed upon it by Congress in the public interest were the major factors in the development of the existing dispute." Emergency Board No. 62's Report to the President, p. 24.

[31] 48 Stat. 1195 (1934), 45 USCA §155 (1940).

[32] 48 Stat. 1186 (1934), 45 USCA §152 (1943). See Thirteenth Annual Report, National Mediation Board (1947), pp. 2, 41.

action provided for in section 10 of the Act) "to induce the parties to submit . . . to arbitration"; fourthly, if arbitration is refused, "the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, . . . no change shall be made in wages, working conditions or established practices in effect prior to the time the dispute arose."[33]

Applying the facts of the IAM case to the above summary, the question is: can the union go on strike after thirty days from the date arbitration is refused, but *before* the Mediation Board sends notice that mediatory efforts have failed?

The first inquiry necessary to finding the answer is whether the provision prohibiting change has force against the union as well as the carrier, or whether it applies to the carrier alone. Or phrased in a different manner: do the terms "working conditions" and "established practices" include strikes? Presumably, if the purposes of the Act are to be effectuated, they must.[34] The legislative intent, however, appears to the contrary. It seems that the Railway Labor Act before the 1934 amendment did not contain a clause providing for Mediation Board action when arbitration was refused.[35] Prior to the amendment the railroads made a practice of granting benefits to their employees to thwart threatening strikes. The 1934 addition to the Act was aimed at this circumvention.[36] Force is given to this reasoning by noting the difference between the clause appended in 1934 and a similar provision in section 10 of Title I of the Act.[37] The prohibition in this section is directed towards both parties to the dispute.[38] One could significantly ask why, if Congress wanted the amending clause to be binding on both parties, it did not use the same language it used in section 10 of the Act.[39]

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[33] Title I, §5, First, 48 Stat. 1186 (1934), 45 USCA §155 (1940). Also, see Title I, §7, 48 Stat. 1197 (1934), 45 USCA §157 (1940).

[34] Statute cited Note 18, *supra.*

[35] *Virginian Ry. Co. v. Federation No.* 40, 84 F. (2d) 641, 625 (CCA 4th 1936).

[36] Joseph B. Eastman, who was then Federal Coordinator of Transportation, stated, "As the present act reads, a railroad, by rejecting the Board of Mediation's final recommendation to arbitrate the dispute, is enabled to change the rates of pay, rules, or working conditions arbitrarily, prior to the issuance of an order by the President appointing a fact-finding board and maintaining the status quo for 60 days. The only way the employees can now guard against this possibility is for them to be forehanded and arm themselves with a strike vote prior to the termination of mediation, obviously a very unsatisfactory expedient, so as to enable the Board of Mediation to certify to the President that an interruption to interstate commerce threatens, thus enabling him in turn to issue an executive order before the railroad can change the status quo. The railroads have taken advantage of this unintentional hiatus in the present law in several instances. The change now proposed is designed to plug this hole." See also Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, May 22 *et seq.*, 1934, on page 50.

[37] 48 Stat. 1197 (1934), 45 USCA §160 (1940). "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made *by the parties* to the controversy in the conditions out of which the dispute arose (emphasis supplied)."

[38] *Texas & N. O. Ry. Co. v. Brotherhood of Railroad Clerks*, 281 U.S. 548 565-567 (1930). ("It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings.")

[39] For the Congressional intent of §10 see Hearings before the House of Representatives Committee on Interstate and Foreign Commerce, H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926). *Cf.* Emergency Board No. 62's Report to the President, pp. 24-26 (the Board felt that §5 was not binding on both parties, that "wages, working conditions, and established practices" were within the exclusive control of the carrier.)

For the purposes of argument assuming that the section 5 amendment is meant to be binding on both the parties, then, when does the thirty day period begin to run? Does it begin after arbitration is refused or after the Mediation Board sends its notice? Grammatically, "if arbitration . . . shall be refused" is the introductory clause to the provision, and would seem to be a condition precedent to the two following conditions, namely, that the Board shall give notice of its failure of mediatory efforts, and secondly, that no changes shall be made in the rates of pay, working conditions, etc. This would mean that the thirty days would begin to run from the date arbitration is refused. The words "and for thirty days" are followed by the word "thereafter" which must refer to the Board's giving notice, which is found in the same clause. What was presupposed, then, was that notice of the failure of mediatory efforts and the refusal of arbitration were to be simultaneous. The giving of notice by the Mediation Board must be a ministerial duty to inform the parties. Failure of the Board to execute this duty probably was not intended to bind the parties. Therefore, from the facts of this case, *i.e.*, where the refusal to arbitrate came more than thirty days before the notice that the Board's efforts had failed, the union, even if it were bound by this provision, would not violate the Act by going on strike when it did.

## Conclusion

It seems evident that the carrier violated applicable provisions of the Railway Labor Act, as the Emergency Board so found.[40] The carrier's arguments which would have read Taft-Hartley leniency into the Act applicable to air carriers have dissipated in view of recent Congressional activity in the field of labor law unless some Taft-Hartley policy is retained in the new bill. Section 401(1) (4) of the Civil Aeronautics Act provides: "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.[41] Given a violation of the Act, the ramifications of this statute are open to speculation.[42]

Walter S. Davis, Jr.*

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[40] "A) The Board, therefore, recommends that the striking pilots be reinstated as working employes. b) The Board further recommends that paragraph (m), page 23, of the agreement between National Airlines, Inc., and the Air Line Pilots in the service of the National Airlines, Inc., effective December 9, 1941, be amended and supplemented to the end that in case the said System Board of Adjustment becomes deadlocked and unable to reach a decision on any matter properly coming before it, either party may thereupon petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment, as a member thereof. Such System Board of Adjustment as then constituted shall hear the parties with reference to the dispute pending before it, de novo, and a majority vote of the Board shall be final and conclusive between the parties. c) The Board also recommends that the O'Neal dispute be finally determined pursuant to the agreement of the parties dated May 14, 1947, by the System Board of Adjustment augmented by a neutral member to be appointed by the National Mediation Board." Emergency Board No. 62's Report to the President, pp. 15-16.

[41] 52 Stat. 937 (1938), 49 USCA §481 (1943).

[42] The pilots strike remained unsettled. On September 28, 1948, the CAB initiated a formal investigation to consider the advisability of awarding National's routes to other carriers. CAB Order, Serial E-2025. Subsequently, the pilot strike was settled by mediation in which James M. Landis, former Chairman of CAB, played a major role. American Aviation Daily, Nov. 26, 1948, p. 136. The settlement involved a plan whereby deadlocks in the system board of adjustment will be abolished by the appointment of an arbiter. Mr. Behncke, President of ALPA, indicated that this procedure might be written into all future airline contracts.

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# BOOK REVIEWS

**AIRPORT MANAGEMENT, by John H. Frederick. (Chicago: Richard D. Irwin, Inc., 1949. 312 p. $4.00)**

In the past five years, it has become increasingly apparent that comprehensive understanding of the economic phases of airports, their maintenance, operation and financial management, has become an important subject requiring research. In his recent book, Dr. John H. Frederick, of the University of Maryland, offers a digest of much of the knowledge essential to good airport management. Taken from many sources, it is compiled and presented in a forceful manner because of his wide and diversified experience in the field of airport management education.

Dr. Frederick points out all airports of a given type and class have many similar elements in their administration and operation and proceeds to note some common management denominators which will prove helpful for all airports. This text for students of airport management presents a background of the airport system in the United States, outlining types according to their use and setting forth some characteristics of the different types of airports from major airline terminals to flight strips, seaplane bases and airship landing areas. The author judges airport adequacy in light of technical standards such as runway length, acreage, accessibility, equipment and buildings. Much of this data is based on wide experience and personal investigation.

Economic considerations of airport development and operation are also very comprehensively covered. The relationship of economics to airport operation and aviation demand, as set forth in this text, will generate considerable interest. One point here made is so important that it could well be used as a motto: "An airport, no matter how long the runways, is never any bigger than the community it serves."

The material on airport planning in Chapters IV and V has been based solely on technical requirements, however, instead of on the economic and socio-economic need of airports, correlated with technical requirements. Development of the castered gear makes wind coverage requirement in this book obsolete. Progressive airport planning calls for a maximum of two runways serving four directions.

Dr. Frederick also opposes maximum standards for runways and taxiways on the basis that such maximum standards will retard design of more efficient transport aircraft. Economically this opinion cannot be substantiated. Such standardization only establishes characteristics for landing and take-off, climb and glide and wheel loading. Engineers are left wide areas of discretion within which they may work, as long as aircraft characteristics do not render obsolete the tremendous investment in airport facilities which is many times the investment in transport aircraft.

Runway standardization is also opposed on the basis that airline operators must use aircraft with greater payloads and longer ranges to reach financially sound operation. In assuming this position, based on manufacturers' and airline opinions, the author does not consider the goal of the community providing a public airport. Frequency of schedules is the main criteria for adequacy of airline service to a community. When the size of airline aircraft is increased, the frequency of schedules must decrease, since the volume of passengers originating or terminating in any given city does not fluctuate in

accordance with the size of aircraft serving it. Not only is a decrease in service undesirable from a community's point of view, but the position taken in this book (concurring with the stand taken by manufacturers and airlines for runway lengthening to accommodate larger aircraft) is in reality a request for more municipal subsidy, since airport expansion which decreases adequacy of service is a markedly poor investment.

Dr. Frederick's discussion of airport terminal buildings, largely based on airline opinions and hopes, provides the most complete presentation of the controversial "centralized vs. decentralized" terminal planning argument which can be found in any published material, and includes excellent comments on the disadvantages inherent in decentralization in reference to Chicago's new terminal building.

Much of the terminal planning data pertains only to the large major airports. Dr. Frederick covers the subject of cargo handling facilities, showing that freight handling can parallel the well-established pattern of materials-handling pioneered and developed in other forms of cargo transport. The discussion on master airport planning has been based on CAA's method of airport design, and following the requirements established by CAA, all reference to economic, socio-economic and financial limitations in preparing master plans have been omitted. Chapter VI on approach zoning and air space rights will prove of benefit since it provides valuable source references.

The last ten chapters can be classified under three general headings: Airport Operation, Management of Finances, and Administrative Policies. Within these groups, the main emphasis is on management of finances, and the subject of airport revenues is very completely treated. Various sources of revenue are outlined, and a discussion of some of the peculiarities of each revenue source is made. If every person connected with the management of airport finances would use this text as a check list in developing new revenues for airports, a major step toward self-supporting airport operation would be the inevitable result. These final chapters constitute a very comprehensive and usable text for the student of airport management. The information is much more usuable for the larger airport, and almost solely for public airports, and will not generally prove too practical for the fixed base operator. The more serious student may find certain flaws in coordination brought about by the controversial nature of most of the subjects.

Dr. Frederick's book is the first prepared solely for airport management, and should benefit the industry in all its phases, although no conclusive answers will be found to provide a uniformity in practices. This excellent collection of viewpoints from many segments of the aviation industry will prove profitable reading for those concerned with airport management.

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